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No.

In the

Supreme Court of the United States

In the Matter

of

EDWARD GADSON, RICHARD KATWARU, KHEMWATIE RAMNAUTH, LISA SIMONELLI and VICTORIA GOVERNALI,

Petitioners,

versus

SUSAN WALKER, BAYER CORPORATION, BAXTER HEALTHCARE CORPORATION, ALPHA THERAPEUTIC CORPORATION AND ARMOUR PHARMACEUTICAL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a mass tort class action certification is *res judicata* as to absent class members, so that in their direct appeal of a district court's anti-suit injunction order terminating their ongoing state court actions as authorized by the All Writs Act, the absent class members are denied the opportunity to be heard on their due process collateral attack against the final judgment that improperly certified a settlement-only class that had previously been decertified as a litigation class.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were:

Petitioners Edward Gadson, Richard Katwaru, Khemwatie Ramnauth, Lisa Simonelli, and Victoria Governali, and Respondents Susan Walker, Rhone-Poulenc-Rorer, Inc., Armour Pharmaceutical Company, Bayer Corporation, Baxter Healthcare Company, and Alpha Therapeutic Corporation.

The following Respondents have corporate affiliations to be listed under Rule 29.6:

(A) Rhone-Poulenc Rorer, Inc.'s parent is Rhone-Poulenc S.A. No publicly held companies own 10% or more of the stock of Rhone-Poulenc Rorer Inc., except its parent Rhone-Poulenc S.A.

(B) Armour Pharmaceutical Company's parent is Rhone-Poulenc Rorer International (Holdings) Inc. No publicly held companies own 10% or more of the stock of Armour Pharmaceutical Company. Rhone-Poulenc Rorer, Inc., which owns 100% of the stock in Armour Pharmaceutical Company's parent Rhone-Poulenc Rorer International (Holdings) Inc., has issued shares of stock to the public.

(C) Bayer Corporation's parent is Bayer A.G., which owns 100% of the stock of Bayer Corporation.

(D) Baxter Healthcare Corporation's parent is Baxter International, Inc., which owns 100% of the stock of Baxter Healthcare Corporation.

(E) Alpha Therapeutic Corporation's parent is Green Cross Corporation of America, which owns 100% of the stock of Alpha Therapeutic Corporation.

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I

PETITION FOR WRIT OF CERTIORARI

Petitioners Edward Gadson, Richard Katwaru, Khemwatie Ramnauth, Lisa Simonelli and Victoria Governali respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on November 15, 2000.

Opinions Below

The November 15, 2000 Decision of the United States Court of Appeals for the Seventh Circuit affirming the anti-suit injunction is reported at 2000 U.S. App. LEXIS 29384 (Nov. 15, 2000), and is reprinted in the Appendix hereto, pp. 1a-3a, *infra*.

The February 2, 2000, order of the MDL court issuing an anti-suit Injunction Order barring these state court plaintiffs from any further prosecution of their personal injury actions pending in New York State Supreme Court is not reported, but is reprinted in the Appendix hereto, pp. 7a-8a, *infra*.

The April 16, 1999 order of the MDL court amending the March 3, 1999 Injunction Order is not reported, and is reprinted in the Appendix hereto, pp. 9a-10a, *infra*.

The March 3, 1999 order of the MDL court denying the Rule 60 motions of certain other members of the settlement class is not reported, and is reprinted in the Appendix hereto, pp. 11a-16a, *infra*.

The March 3, 1999 Injunction Order of the MDL court is not reported, and is reprinted in the Appendix hereto, pp. 17a-18a, *infra*.

The March 3, 1999 Memorandum Opinion of the MDL court on the fractionator defendants' motion to enjoin certain class members from litigating duplicative lawsuits is not reported, and is reprinted in the Appendix hereto, pp. 19a-24a, *infra*.

The decision of the Seventh Circuit denying a petition for writ of mandamus to other class members is reported at In re Factor VIII or IX Concentrate Blood Products Lit., 159 F.3d 1016 (7th Cir. 1998), and is reprinted in the appendix hereto, pp. 25a-32a, *infra*.

The May 15, 1997 Order of the MDL court concerning requests for late opt-outs is not reported, and is reprinted in the Appendix hereto, pp. 33a-34a, *infra*.

The May 8, 1997 final judgment of the MDL court approving certification of the "settlement-only" class action is not reported, and is reprinted in the Appendix hereto, pp. 35a-51a, *infra*.

The August 14, 1996, order of the MDL court preliminarily approving a "settlement-only class" action under the caption Susan Walker v. Bayer Corporation, et al., No. 96-CV-5024 (N.D.Ill.E.D.), is not reported, and is reprinted in the Appendix hereto, pp. 69a-77a, *infra*.

The order of the Seventh Circuit granting the fractionators' petition for a writ of mandamus decertifying the litigation class, is reported at *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. den.*, 116 S. Ct. 184 (1995).

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was decided and entered November 15, 2000. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

Statutes Involved

UNITED STATES CONSTITUTION:
Fifth Amendment: reprinted in appendix hereto, p. 83a
Federal Rules of Civil Procedure Rule 23: reprinted in appendix hereto, pp. 78a-82a

Statement of the Case

The petitioners at bar are state court plaintiffs with personal injury claims stemming from exposure to contaminated factor concentrate blood products who were enjoined from further prosecuting their actions by the issuance of an anti-suit injunction order of a district court presiding over multidistrict litigation proceedings based on a "settlement-only" class action it had previously certified. There has never been an examination as to whether the settlement-only class was properly or improperly certified under subdivisions (a) and (b) of Rule 23. Although appeals were noticed, no direct appeal of the class certification was prosecuted. The only review thus far has been through collateral attack by way of petitions for mandamus by other class members which were denied without examining the class certification under Rule 23 criteria, although in the course of deciding the mandamus petitions, the Seventh Circuit has described the factor concentrate class settlement as "weird" and "questionable," references to the fact that it established a uniform $100,000 payment to each eligible class member.

Significantly, however, while the Rule 23 propriety of the settlement class certification has not been directly or indirectly reviewed, it clearly suffered the preclusive effects of a prior decision of the Seventh Circuit itself that had decertified a *litigation* class involving these same class members and claims against the same settling defendants. Indeed, this decertification occurred as a result of a mandamus petition by the defendants, in the course of which the Seventh Circuit ruled in their favor that a litigation class could not be certified because it did not meet the predominance and superiority requirements of Rule 23. Thus, it becomes clear the district court later turned around and certified this *settlement* class as a Rule 23 action, even though the Seventh Circuit had previously decertified a *litigation* class comprised of the identical class members with

the same claims on the grounds the class did not meet the requirements of Rule 23(a) and (b).

Petitioners are absent class members who had not personally participated in any capacity in the settlement-only class certification proceedings, and had neither opted in nor out of the class settlement within the 45-day period set forth in the class notice. At the time the anti-suit injunctions were issued, the petitioners at bar were pursuing state court actions that were timely under New York's discovery-of-the-injury statute of limitations, as well as a revival statute specifically allowing suits against these fractionators during a one-year window.

Petitioners sought reversal of the MDL district court's anti-suit injunctions on the due process grounds that the class action could not have been properly certified under and violated Rule 23(a), (b) and (c), and that they had inadequate representation and notice. The Seventh Circuit affirmed the anti-suit injunctions without addressing any of the petitioners' due process challenges to the class certification on the ground that:

> We acknowledged that the class action might be "questionable," 159 F.3d at 1018, but held that it was not void and could not be collaterally attacked. The appellants have given us no reason to overrule our two-year-old decision.

App. 3a. The "two-year-old decision" rejected a mandamus petition brought by other class members who had participated in or consented to the settlement by opting in before the notice deadline, and then sought to challenge expanded releases they were required to sign in exchange for the $100,000.

The Seventh Circuit's rulings in the decision for which review is sought rejects all collateral attacks against this particular settlement, and makes the absence of a class

member tantamount to participation by consent or default. On due process grounds this Court should overrule the application of preclusion principles to these petitioners and reach the constitutional issues surrounding the class certification in light of the Seventh Circuit's *sub silentio* acknowledgment that this settlement class did not meet the prerequisites of the applicable subdivisions of Rule 23. In this regard, it is respectfully submitted this petition preliminarily raises the significant, but narrower due process issue of whether or not a class certification, through the passage of time or the disposition of collateral attacks by other class members, becomes *res judicata* as to or collaterally estops other absent class members with mass tort personal injury claims from raising in their direct appeal of the anti-suit injunction order a collateral attack against the judgment that improperly certified a settlement-only class used as the basis underlying the district court's invocation of the All Writs Act. Both the district court and the Seventh Circuit here collaterally estopped these petitioners from making their own due process challenges on the basis of injunctions entered against other class members, as well as the orders and judgment provisionally and finally approving a void settlement class as to which these petitioners assert they had no legal duty to include or exclude themselves, despite the notice employed by the proponents of the class.

Petitioners submit their arguments show the likelihood for success in reversing the anti-suit injunctions for the same reasons the anti-suit injunction in Amchem was reversed, and submit an absent or future non-party should have the opportunity to challenge an improperly certified class action that did not comport with the rules that enable a federal court to interfere with an individual's right to trial of claims against a tortfeasor. Petitioners respectfully submit they will be unable to challenge the unconstitutionality of the settlement class that is the basis of the writs enjoining their state court actions unless a writ is issued by this Court, because they have been prevented from mounting a collateral

attack in response to the injunction against pursuing their state court claims.

REASONS FOR GRANTING THE WRIT

I. Petitioners Have Been Denied Their Procedural Due Process Rights As Absent Class Members to Collaterally Attack The Certification of the Settlement-only Class in a Direct Appeal of an Anti-Suit Injunction That Has Terminated Their Ongoing State Court Actions.

Petitioners submit the instant case raises issues of paramount public importance in view of the public interest in the process that is provided absent class members when a federal district court certifies an encompassing opt-out settlement-only class that usurps the individual's right to make decisions on whether and when to settle a claim for personal injuries. In seeking a writ in this Court, petitioners initially raise the issue of whether due process in the class action context provides individual absent class members the right to collaterally attack the certification of a settlement-only class on due process grounds when they are subjected to an injunction enjoining, and are open to contempt of court for, further prosecution of litigation. Petitioners address the substantive constitutional infirmities of the settlement-only class certification separately as related to determining the availability and meritorious nature of the collateral attack.

In turning directly to the preliminary due process issue, it is only necessary to note that "[t]he district court enjoined the appellants, members of a class consisting of hemophiliacs who became infected with HIV by contaminated blood solids manufactured by the defendants, from seeking to avoid the settlement of the class action by suing the defendants on the same claim in state court."/*[1]

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[1]*/The district court entered an Injunction Order on February 2, 2000, in

App. 2a. In its decision affirming the anti-suit injunction, the Seventh Circuit did not examine the class certification in any respect. Instead, it referred to these petitioners' collateral attack as "a sequel" to one of its prior published opinions/*[2] and a subsequent unpublished order/*[3] involving other class members, and ruled:

> A statement in the published opinion is dispositive of this appeal: "After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone **by some who, having participated in the case**, cannot complain that his rights were infringed without his knowledge." 159 F.3d at 1019.

App.2a [emphasis added]. The court went on to explain its basis for concluding that the appellants, including petitioners here, "participated in the case" as follows:

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which it incorporated in a conclusory fashion various prior orders and decisions made with respect to other claimants/litigants, including a prior order of March 3, 1999, by which the district court had denied the Rule 60 motions of other claimants who had opted into the settlement, and included the following ruling on the issue of "voidness":

> Movants argue that the order of May 8, 1997 approving the class settlement is void under the Amchem case. We rejected this argument in our order of February 18, 1998, (id. at 9-11), as did the Seventh Circuit in its mandamus ruling. We adhere to our own previous decision, and, more importantly, follow the decision of the Seventh Circuit.

App. 13a.

[2]*/ In the Matter of Rhone-Poulenc Rorer Pharmaceuticals, Inc., 159 F.3d 1016 (7th Cir. 1998).

[3]*/ Reported at 1999 U.S.App. LEXIS 26427, 1999 WL 809729 (7th Cir. Oct. 7, 1999).

> Three of the appellants are identically situated to the claimants whose appeals we rejected in our October 7, 1999 order. The other four claim not to have received notice of the proposed settlement, but the district court with ample basis rejected the claim as factually unfounded. One of these four, Gadson, further claims that he didn't know he had HIV until after the deadline for opting out of the class, which was October 15, 1996. The reason he didn't know is that, though he had every reason to believe that he had not only HIV but indeed full-blown AIDS, having had seizures as early as 1987, he delayed being tested until 1997, at which time he discovered his infection had already proceeded to the AIDS stage. This was an ostrich tactic equivalent to knowledge.

App. 2a-3a. Thus, while apparently acknowledging that the "other four" (petitioners here) had not in fact participated in the class action, the Seventh Circuit appears to rule that actual or constructive notice of the class transformed these absent unnamed class members into named participants who should have intervened and exhausted appellate remedies, since its ultimate holding was as follows:

> Without acknowledging the statement quoted above from our previous opinion, the appellants make as their major pitch the argument that they are indeed entitled to mount a collateral attack on the settlement, which they claim should not have been entered because among other things the class action was not proper under Fed.R.Civ.P. 23. We acknowledged that the class action might be "questionable," 159 F.3d at 1018, but held

> that it was not void and could not be collaterally attacked. The appellants have given us no reason to overrule our two-year-old decision.
>
> AFFIRMED.

App. 3a. Indeed, the "previous opinion" rejected another class member mandamus petition, but stated that:

> The settlement embodied in the consent decree may well be questionable, both in its form (cf. *Amchem Products, Inc. v. Windsor*, 138 L.Ed.2d 689, 117 S.Ct. 2231 (1997), disapproving "settlement classes," albeit in different circumstances from those of this case), and in its terms. That all the members of the class should receive the identical payment, even though the strength of their cases (some of which appear to be barred by the statute of limitations) and the amount of their damages must vary greatly, is downright weird.

In re Factor VIII and IX Concentrate Blood Products Litigation, etc., *supra*, 159 F.3d at 1018. The Seventh Circuit went on to rule the district court had Article III jurisdiction to approve the factor concentrate settlement-only class (*id.*, 159 F.3d at 1018), but did not address the Rule 23 criteria. In Amchem, this Court found that, "because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach [the class certification issues] first." *Id.*, 521 U.S. at 612-613, 117 S.Ct. at 2244. The Seventh Circuit called this settlement "downright weird" and "questionable", but affirmed it nonetheless, and relies on its holding in a prior appeal that "it was not void and could not be collaterally attacked." It is respectfully submitted, in affirming the judgment of the

multidistrict court certifying the class action settlement at issue here, the Seventh Circuit turned this Court's Amchem decision on its head by ignoring the holdings therein that (1) the class certification issues are dispositive, because their resolution was logically antecedent to the existence of any issues, such as justiciability or standing, arising under Article III of the Federal Constitution; and (2) while the settlement is relevant to the determination whether certification of the class is proper under Rule 23, the class must satisfy the prerequisites Rule 23 (a) and (b)*id.*

These determinations by the Seventh Circuit as to the instant petitioners' appeal are clearly intended to overcome the fact that they had not "participated in" the settlement class at all, and were future litigants at the time of the class certification and entry of the anti-suit injunctions./*[4] The above rulings evince an alarming disregard for protecting absent class members, and raise a number of concerns. One concern would be, where as here the named class representative (Susan Walker) had no incentive to appeal because it was a settlement, can the absence of a prior appeal of the final judgment certifying a class become immediately and inexorably *res judicata* as to absent class members, impervious to any due process challenge. Another concern is whether there is a point in time when a collateral attack by an absent class member is no longer timely or viable. In this

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[4]*/None of the petitioners at bar were federal or state court plaintiffs at any time prior to the provisional approval of and final judgment certifying the class settlement, and the district court had no jurisdiction over them derived from the multidistrict proceedings pending before it at that time. Petitioners' individual cases involve different brands of Factor VIII, different periods of infusion with Factor VIII, different amounts and frequencies of such infusions, different medical histories, different hospitals with varying access to infusion logs and other records identifying the Factor VIII product, different dates of HIV diagnosis, and other individualized matters. All of their state court actions were timely under New York law by virtue of its discovery-of-the-injury limitations statute, as well as a revival statute that extended the time to file suit against these fractionators to December 31, 1997.

regard, these petitioners have been told that they have no grounds to appeal the anti-suit injunction entered against them, apparently because they "participated" by default. Most disturbing, however, is the question of whether or not the certification of a settlement-only class will be able to escape review through collateral attack as to whether it was properly certified, particularly where the district court utilizes injunctive power to force the absent class member to participate in the settlement and forfeit individual litigation.

The Seventh Circuit's decision in the matter at bar is certainly discordant with its rulings in Tice v. American Airlines, 162 F.3d 966 (7thCir. 1998), where it denied an anti-suit injunction, noting, in pertinent part:

> Unless there is a properly certified class action, handled with the procedural safeguards both state and federal rules afford, normal privity analysis must govern whether nonparties to an earlier case can be bound. There would be little point in having Rule 23 if courts could ignore its careful structure and create *de facto* class actions at will; indeed, the Supreme Court's recent decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), emphasizing the importance of following Rule 23's procedures for settlement classes, suggest that such an approach would be unauthorized.

Id., 162 F.3d at 972-73. The Seventh Circuit ultimately concluded in Tice that an anti-suit injunction could not lie, because the absent class members had not been adequately represented in the prior action -- the interests of the class members were too divergent to prevent a potential conflict of interest from sabotaging due process. *Id.*, 162 F.3d at 973.

Unnamed class members have standing to seek to nullify a Rule 23 judgment asserted against them on the

ground that the judgment violated due process, either because of lack of notice or because of inadequate representation, as confirmed by the fact that Amchem considered the appeal of a state court asbestos plaintiff who was diagnosed with mesothelioma in May 1994, after expiration of a class action settlement opt-out period, sued certain members of a "consortium of 20 former asbestos manufacturers" in a Maryland state court, and was "charged with civil contempt for violating the federal District Court's anti-suit injunction." Amchem, 521 U.S. at 599-600 and 605. "Absent class members may assert their due process rights `through collateral attack or otherwise.'" Zablocki v. Redhail, 434 U.S. 374, 380, n. 6, 98 S.Ct. 673, 678 n.6 (1978); *see also* Phillips Petroleum v. Shutts, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985). "Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process, and an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process." Twigg v. Sears Roebuck and Co, 153 F.3d 1222, 1226 (11th Cir. 1998).

The prerequisites of Rule 23(a) and (b) are "essential to due process, because a final judgment in a class action is binding on all class members." In re: American Medical Systems, Inc.; Pfizer, Inc., 75 F.3d 1069, 1083 (6th Cir. 1996). Significantly, petitioners in the case at bar asked the Seventh Circuit to revisit the Factor Concentrate settlement-only class certification from their perspective as absent and future members in the light of that court's own prior decision in which it had decertified the same class as a *litigation* class action, Matter of Rhone-Polenc Rorer, Inc., 51 F.3d 1293, 1296-1297 (7th Cir.), *cert. den.*, 516 U.S. 867, 116 S. Ct. 184 (1995), discussed *infra*, as well as in light of this Court's decisions in Amchem and Ortiz v. Fibreboard Corporation, et al., 119 S. Ct. 2295, 144 L. Ed. 2d 715, 67 U.S.L.W. 4632 (1999). The court declined to address the same by

precluding these petitioners from raising these issues in their direct appeal of the anti-suit injunctions collaterally attacking the certification of the settlement class.

In Amchem, this Court fully explained the reasons for protecting absent class members when subdivision (b)(3) is utilized, as follows:

> In the 1966 class-action amendments, Rule 23(b)(3), the category at issue here, was "the most adventuresome" innovation. See Kaplan, A Prefatory Note, *10 B. C. Ind. & Com. L. Rev. 497, 497 (1969)* (hereinafter Kaplan, Prefatory Note). **Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded.** See 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1777, p. 517 (2d ed. 1986) (hereinafter Wright, Miller, & Kane); see generally Kaplan, Continuing Work 379-400. Rule 23(b)(3) "opt out" class actions superseded the former "spurious" class action, so characterized because it generally functioned as a permissive joinder ("opt in") device. See 7A Wright, Miller, & Kane § 1753, at 28-31, 42-44; see also Adv. Comm. Notes, *28 U.S.C. App., p. 695.*
>
> Framed for situations in which "class-action treatment is not as clearly called for" as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit "may nevertheless be convenient and desirable." Adv. Comm. Notes, *28 U.S.C. App., p. 697.* To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a)

> prerequisites: Common questions must "predominate over any questions affecting only individual members"; and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." ....

Amchem, 521 U.S. at 614-615, 117 S.Ct. at 2245-2246 [emphasis added]. "Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view", *id.*, 521 U.S. at 629 [citations omitted].

Tice confirms that the requirement of privity, usually operative in deciding claim preclusion, is only waived in a class action when the class has been "properly certified" such that no due process rights have been compromised. Amchem teaches that a class that should not have been certified under the Rules is not merely voidable, but is void, and this issue should be addressed separately from the issue of whether proper notice was given to the class members under the other provisions of the rule that are dependent upon the prerequisites in Rules 23(a) and (b). Moreover, the Seventh Circuit itself has ruled that "even after a class has been certified, a district court must remain vigilant to ensure that Rule 23(a) prerequisites are present." Culver, v. City of Milwaukee, 1999 U.S.App. LEXIS 26473, at p. 12-13 (7th Cir. 1999) [unpublished opinion], *citing* General Tel. Co. v. Falcon, 457 U.S. 147, 161, 72 L.Ed.2d 740, 102 S.Ct. 2364 (1982), and Toney v. Burris, 881 F.2d 450, 454 (7th Cir. 1989) "(remanding a class action case to the district court 'so that it may consider whether the order certifying the class is still appropriate')."

In this case, it is clear the class representative plaintiff agreed to the settlement and did not appeal it for that reason. Scrutiny of the issues surrounding adequacy of representation in class settlements is to be greater, and not less, than the scrutiny applied to non-settlement class actions. "Such

attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." Amchem, 521 U.S. at 620, 117 S.Ct. at 2248. Consistent with Amchem's requirement that class members be "fairly represented," and not just that an apparently "fair" settlement is reached, courts have heightened the scrutiny they afford to absent class members.

This Court's Amchem decision put the named settling parties on notice of the very real likelihood that the instant settlement did not comply with the statutory requirements of Rule 23(a) and (b)(3) and could be constitutionally challenged by absent or future members. The fractionators proceeded at their own risk with respect to the legality of the settlement and any violation of due process it represented, and absent and future class members cannot be bound by a settlement that did not comport with Rules 23(a) and (b), or that was based on the mandatory self-exclusion notice it generated.

Absent class members are under no duty to intervene in or monitor class proceedings. Epstein v. MCA, Inc. (Epstein II), 126 F.3d 1235, 1243-45 (9th Cir. 1997). However, in granting the anti-suit injunction at issue here, the district court ruled the Seventh Circuit had already rejected any argument that this class settlement is void under Amchem, and did not address the issue of whether petitioners at bar include "absent" and "future" class members As absent and future class members, petitioners submit they had no obligation to opt into or out of a settlement that was improperly certified, and they are entitled to rely on collateral attack if the settlement is used against them. In this context, the law of the case, *res judicata*, and collateral estoppel should not have been utilized to prevent their appeal of the anti-suit injunctions from raising a collateral attack on the constitutional violations of the settlement-only class certification.

The Seventh Circuit's decision constitutes to a

holding that absent class members must intervene to protect themselves in the class certification proceedings in order to exhaust appellate remedies, which unconstitutionally deprives them of the due process available to them under Rule 23 and for collaterally attacking an injunction based on an improperly certified settlement-only class. The instant petition should be granted by this Court to ensure that a class member's absence is not treated as tantamount to default, waiver or consent.

Petitioners now turn to an examination of the settlement under the lens of Rule 23.

II. The Settling Class Plaintiff and Counsel in the Case at Bar Did Not Meet Their Substantive Obligation of Adequate Representation When They Failed to Support the Propriety of Certification under the Rule 23(b)(3) Prerequisites of Predominance and Superiority, Which, It Is Respectfully Submitted, Renders the Provisional and Final Certification of the Class Settlement below an Unauthorized Violation of Due Process and Void as to These State Court Litigants.

In the personal injury products liability context, it is significant that this Court has noted that, while "the text of [Rule 23] does not categorically exclude mass tort cases from class certification, and District Courts, since the late 1970's, have been certifying such cases in increasing number," it is nevertheless clear that "the [Advisory] Committee advised that such cases are 'ordinarily not appropriate' for class treatment." Amchem, 521 U.S. at 624-625, 117 S. Ct. at 2250. Yet, "[a]mong current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device." *Id.*, 521 U.S. at 618, 117 S.Ct. at 2247. However, heeding the Advisory Committee advice regarding the 1966 revision of Rule 23 "continues to call for caution when individual stakes are high and disparities among class members great", and

caused this Court to reject class certification that "rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design." *Id.*, 521 U.S. at 624-625, 117 S.Ct. at 2250.

In Amchem, this Court has left no doubt that class actions, whether they are litigation or settlement driven, must meet the prerequisites of Federal Rules of Civil Procedure 23(a) and (b) in order constitutionally to bind absent class members. It is or approaches the axiomatic to state that a properly certified "settlement only" class must satisfy Rule 23(b)(3)'s predominance and superiority requirements./*[5] *Id.*, 521 U.S. at 615, 117 S.Ct. at 2245-2246. The requirements of Rules 23(a) and (b) cannot be waived or ignored just because the end sought is a "fair" settlement. Nor does this end justify the means, that is to say, the fairness or desirability of the settlement does not justify the failure to apply the requirements of Rule 23 (a) and (b)(3) to the settlement class. On its face, subdivision (b)(3) places a burden on the proponents of the "settlement-only" class action to show that common issues predominate over individual issues in the underlying claims, and that the class action is superior to the normal adjudication process. Moreover, failure to adhere to Rule 23 would violate not only the express terms of Rule 23, but also the Rules Enabling Act under which it was promulgated.

A. The petitioners' collateral attack on the settlement-only class certification at bar raises substantive and procedural due process issues that confirm that, like the decertified "litigation" class before it, this settlement class should not have been certified by the district

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[5]*/The settlement-only class at bar would have to meet the prerequisites of subdivision (b)(3) requiring a showing of predominance and superiority, since it involves neither a "limited fund" under (b)(1), nor declaratory or injunctive relief under (b)(2).

court and should have been decertified by the Seventh Circuit, and the anti-suit injunctions dissolved.

In the case at bar, there can be no doubt that a settlement-only class followed closely on the heels of the decertification of a litigation class involving the same members and claims. In point of fact, the district court in the factor concentrate multidistrict litigation had in the past granted partial certification of a litigation class for negligence claims only, which was decertified by the Seventh Circuit. Wadleigh, et al., v. Rhone Poulenc Rorer, Inc., et al., 157 F.R.D. 410, 413 (N.D. Ill, E.D. 1994), *mandamus granted, class cert. rev.*, 51 F.3d 1293, 1297 (7th Cir.), *cert. den.*, 516 U.S. 867 (1995). The decisions involved evince that long before it certified the settlement-only class at issue here, the MDL district court had recognized the need to fulfill the requirements of Rules 23(a) and (b) in the certification process. In this regard, it stated in Wadleigh that:

> In addition to fulfilling the prerequisites of Rule 23(a), plaintiffs must satisfy the requirements of Rule 23(b)(3) that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
>
> The court's finding that there are common questions of law and fact sufficient to meet the requirement of Rule 23(a)(2) is not the same thing as a finding that those questions predominate over those that affect only individual members of the class.

Wadleigh, *supra*, 157 F.R.D. at 418. It cannot be gainsaid

that in Wadleigh, the district court previously reached the conclusion individual questions in this factor concentrate litigation clearly predominated over the common questions based on what he considered to be sufficient evidentiary support for that conclusion. His lengthy opinion on the subject did not indicate that he had reached this conclusion lightly. Yet, despite these prior rulings, there was no showing by the settling parties below as to how the individual questions that "clearly predominate" in the litigation context suddenly did not pose a barrier to meeting the predominance requirement in the settlement-only context. Moreover, it is significant that the district court itself rejected the notion that predominance can be shown by the proponents of the factor concentrate class action at bar, as evinced by its prior ruling that:

> On the proximate cause issue in the case against the fractionators, then, **individual questions involving the particular circumstances of each plaintiff, and often the law peculiar to different jurisdictions, will clearly predominate**. The only common question might be the issue of possible aggravation from multiple exposures.

Id., 157 F.R.D. at 422 [emphasis added]. Indeed, this predominance of individual issues caused the district court to limit the proposed litigation class to negligence liability, and, on appeal, the Seventh Circuit appears to have agreed, stating in its subsequent mandamus decision that:

> The district judge did not think it feasible to certify Wadleigh as a class action for the adjudication of the entire controversy between the plaintiffs and the defendants. Fed.R.Civ.P. 23(b)(3). The differences in the date of infection alone of the thousands of

> potential class members would make such a procedure infeasible. Hemophiliacs infected before anyone knew about the contamination of blood solids by HIV could not rely on the second theory of liability, while hemophiliacs infected after the blood supply became safe (not perfectly safe, but nearly so) probably were not infected by any of the defendants' products.

Matter of Rhone-Polenc Rorer, Inc., 51 F.3d 1293, 1296-1297 (7th Cir.), *cert. den.*, 516 U.S. 867, 116 S. Ct. 184 (1995).

The aforesaid mandamus decision occurred upon the defendant fractionators' petition to decertify the negligence litigation-class the district court had crafted, and resulted in successfully reversing the partial class certification because the Seventh Circuit ruled class treatment was not appropriate under Rule 23. *Id.* On the issue of superiority, it appears dispositive that the Seventh Circuit expressly ruled in the prior decision decertifying the litigation class that:

> We know that an approach similar to that proposed by Judge Grady has been approved by asbestos litigation. ...Most federal courts, however, refuse to permit the use of the class-action device in mass-tort cases, even asbestos cases. ...The number of asbestos cases was so great as to exert well-nigh irresistible pressure to bend the normal rules. **No comparable pressure is exerted by the HIV-hemophila litigation. That litigation can be handled in the normal way without undue inconvenience to the parties or to the state or federal courts.**

Matter of Rhone-Polenc Rorer, Inc., *supra*, 51 F.3d at 1304

[emphasis added]. The Seventh Circuit also noted that "class action treatment...has been denied in all the other hemophiliac HIV suits in which class certification has been sought".... *Id.*, 51 F.3d at 1298. Thus, the prior rulings of the district court in granting partial certification and the Seventh Circuit in decertifying the litigation class confirm the subsequent settlement-only class would not and did not, from its inception, qualify under Rule 23(b)(3).

There is no reason to believe the predominance and superiority factors were obviated or met by the simple expedient of adopting a settlement-only posture in the months after the litigation class was decertified. However, as events would have it, on August 13, 1996, a "Factor Concentrate Litigation Settlement Agreement" was finalized and a complaint and motion for certification of a settlement-only class were filed in the MDL court the same day under the caption Susan Walker v. Bayer Corporation, et al., No. 96-C-5024 (N.D.Ill.E.D.), and the next day, August 14, 1996, the district court granted the motion, preliminarily approved the settlement agreement and authorized dissemination of notice of the settlement to the class members defined in the agreement. App. 69a-77a It cannot be doubted that the only difference between the prior decertified class and this new class was that the latter has its basis in a settlement. App. 64a-65a.

The district court's final order approving the settlement did not mention which subdivision of Rule 23(b) ("Class Actions Maintainable") was applicable, nor did the same address the factors set forth in subdivision (a) ("Prerequisites to a Class Action"). Instead, the court referenced its prior order provisionally approving the settlement class the day after the complaint and certification motion were filed in August 1996, and the fact that "[o]n November 25, 1996, this court held a hearing pursuant to notice to consider final approval of the settlement", at which it "considered the objections of persons opposed to the settlement and finds nothing in the objections to justify

rejection of the settlement." App. 40a. After considering and rejecting the various objections, the court made a conclusory ruling that " the Settlement Agreement among the parties is fair and reasonable for the Settlement Class Members and is in accordance with Rule 23 of the Federal Rules of Civil Procedure." App. 49a. Pertinent to this appeal, the district court found and ordered that "all members of the Settlement Class who have not filed a timely notice of exclusion from the Settlement Class have for themselves and any party claiming through them released and forever discharged the fractionator defendants" and "are forever barred from instituting, assigning, maintaining, collecting or prosecuting, claims against defendants." App. 49a.

In Amchem, this Court unanimously and unequivocally held a "settlement only" class is not immune from the strictures of Rule 23, and in fact may be subject to closer Rule 23 scrutiny than a class certified for litigation purposes. Indeed, it is accepted jurisprudence that:

> In products liability actions, however, individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case.

In re Northern Dist. Calif., Dalkon Shield IUD Products Liability Litig., 693 F.2d 847, 853 (9th Cir. 1982), cert. den., 459 U.S. 1171 (1983) ("commonality begins to be obscured by individual case histories", *id.*, 693 F.2d at 854. With

respect to the issue of commonality under Rule 23(a)(2), "there is an important check on this requirement under Rule 23(b)(3)." In re: American Medical Systems, Inc.; Pfizer, Inc., *supra*, 75 F.3d at 1080./*[6]

It is most revealing that the Final Order and Judgment certifying the settlement class in the case at bar does not mention the Rule 23(a) or (b) prerequisites, either expressly or by implication, with the possible exception of touching on the adequacy of counsel issue.*/[7] Petitioners submit that the absence of any specific findings under Rule 23(a) or (b) is conspicuous in the case at bar in light of the existence of prior decisions certifying and then decertifying a partial litigation class action, and makes it unclear whether the prior decisions were implicitly overturned, or at least not considered relevant, when the settlement class involving the same membership was later certified. Thus, it appears,

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[6]/*In this regard, it is pertinent that in considering "The Strength of Plaintiffs' Case on Merits," the district court flatly acknowledged, *inter alia*, that:

> **Most class members** are faced with significant problems of limitations, proximate cause and product identification, as well as the task of persuading a jury that defendants should be found negligent on the basis of acts and omissions that preceded discovery of the AIDS virus. (Only a few jurisdictions recognize strict liability in blood product cases.)

App. 42a [emphasis added] . These findings indicate the settlement was approved despite the absence of any sub-classes of claimants, in particular differentiating cases in which the statute of limitations had not yet expired, or the exposure took place when the fractionators can be deemed to be on notice of the defect.

[7]*/In this regard, the district court focused on the competence of counsel, stating he was "fully confident that there has been no collusion between class counsel and the defendants. Class counsel are competent and have conducted this litigation vigorously for the past four years. The court has had many opportunities to observe counsel since 1993 when the MDL was formed. The virtually unanimous support of plaintiffs' counsel for the settlement is a factor favoring its approval." App. 45a.

despite the Seventh Circuit's decision in Rhone-Polenc, *supra*, ruling that no litigation class could be certified, that the district court turned around and certified a settlement class just as sweeping in its reach, apparently with the idea that the rigors of Rule 23(a) and (b) could be relaxed in the settlement-only context. It is telling indeed that the fractionators fought certification of a litigation class, but embraced a settlement class.

B. The self-exclusion provisions of Rule 23(c)(2) were not properly invoked to bind class members because the settlement-only class could not, in the first instance, be maintained under Rule 23(b)(3).

It is respectfully submitted that the uniformity of $100,000-per-claimant settlement payment in the case at bar strongly implicates a compromise in which the average value of weak and strong cases were blended in a kind of melting pot valuation, rather than through an examination of the Rule 23 (b)(3) criteria.. It is clear the Seventh Circuit's use of the adjectives "downright weird" and "questionable" are direct references to the fact that the settlement calls for an identical $100,000 payment to each class member who opts in and qualifies by presenting adequate proof. There are four defendant corporations involved, and $100,000, while clearly not "paltry",/*[8] is not particularly generous compensation for exposure to and the transmission of the HIV virus that causes AIDS. Under the settlement terms, the criteria for payment of $100,000 boil down to two central facts: (1) a hemophiliac's exposure to Factor VIII or IX concentrate, and (2) a positive HIV test. Thus, it becomes clear this broad definition and identical payment are the result of compromise that takes into consideration differences in the strengths and weaknesses of each class member's litigation potential,

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[8]*/Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997).

including such things as expired statutes of limitations and proof of other HIV-related sources (such as drug use) that affect the value of an individual case.

While the monetary terms of the settlement are enough to call into question the adequacy of representation, there is more. The class action was cast as an encompassing opt-out settlement barring present and future litigation. It also contained a forfeiture clause, under which both the right to the $100,000 payment ***and*** the right to sue the defendants were lost if a person who fit the class definition (even if they did not get actual notice, or did not know they were exposed or were HIV-positive) failed to opt in or out of the settlement within the 45-day notice period./*[9] This sudden-death settlement term violated Rule 23(c)(2). The violation of due process took form in the settlement-only class at issue, namely, the do-nothing forfeiture clause was incorporated into the settlement terms. Thus, the settlement by its own terms and the notice to putative class members based thereon

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[9]*/The notice, *inter alia*, advises, "If you are a member of the Settlement Class, you have the right to exclude yourself ("opt out") from the Settlement Class." However, antithetical to the inclusive nature of class actions, the Legal Notice includes what can only be characterized as a forfeiture clause, to wit:

> **D.Failure to File the Confidential Claim and Exclusion Forms:** If you are a member of the Settlement Class described in this Notice, and you "do nothing" - in other words, do not choose either to participate in the Settlement or exclude yourself ("opt out") from the Settlement Class - you will be barred from any further right to recover from the Fractionators for a claim concerning contamination of Factor Concentrates, even if you already have a lawsuit pending. You will not receive any money from the Settlement Fund, and you will also close the right to pursue an individual lawsuit against these Fractionators.

sought both to utilize and violate Rule 23(c)(2) at the same time, inasmuch as the notice the rule permits must advise each member not only of the deadline for self-exclusion, but also that "the judgment, whether favorable or not, will ***include*** all members who do not request exclusion". Rule 23(c)(2)(B) [emphasis added]. A self-exclusion-by-opt-out clause that results in *exclusion from the settlement* calls into question the adequacy of representation. Notice is also questionable, because a class member is one who must have an HIV-positive test result, which may not have been available to many hemophiliacs during the 45-day notice period, and thus the class included persons who had only potential or future class claims yet were bound by the settlement if they failed to opt in or out.

The Amchem settlement likewise stemmed from "an agreement purporting to bind potential plaintiffs", and the agreement "launched this case, exclusively involving persons outside the MDL Panel's province--plaintiffs without already pending lawsuits." Amchem, 521 U.S. at 601, 117 S.Ct. at 2239. In the case, "as requested by the settling parties, the District Court conditionally certified, under Federal Rule of Civil Procedure 23(b)(3), an encompassing opt-out class. The certified class included persons occupationally exposed to defendants' asbestos products, and members of their families, who had not filed suit as of January 15." Amchem, 521 U.S. at 605, 117 S.Ct. at 2241. The factor concentrate settlement agreement at issue here differs from Amchem only in that it sought to bind all federal and state court pending litigants as well as future litigants.

Having failed to meet their burden to show predominance and superiority in the first instance, the settling parties went on to violate due process by utilizing a self-exclusion opt-out class notice under Rule 23(c)(2) that was constitutionally flawed in form and substance. The text of the rule makes clear that, whether a litigation or settlement-only class is proposed, the opt-out mechanism can only be used if the class can be properly certified under one of the

subdivisions of Rule 23(b) before the exclusion device in Rule 23(c)(2) procedure can serve as notice binding absent members to the proposed class. The use of the self-exclusion mechanism to cut off the rights of absent and future parties is expressly contingent upon a proper (b)(3) certification, which never occurred here.

Moreover, in agreeing to the sudden-death provisions, the settlement-only class representatives agreed to cut off the right to compensation of "do nothing" class members, including these peititioners, who might simply not learn of the settlement through indirect notice in the media advertisements during the option period. Assuming, *arguendo*, that an encompassing opt-out class could be properly certified, the class representatives clearly failed properly to notify and to preserve the right of class members who did not opt out by the deadline to nevertheless be entitled to payment by virtue of inclusion under Rule 23(c)(2)(B), or, to preserve their right to sue if no payment was offered or accepted.

Even if the Seventh Circuit were to conclude this settlement-only class passes muster under Rules 23(a) and (b), the "do nothing" forfeiture clause exceeds the bounds of the express language of Rule 23(c)(2), and is void, and thus violates the Rules Enabling Act, 28 U.S.C. § 2072. The "do nothing" exclusion provision of the settlement gave the settling parties a mechanism to quickly cut off the rights of all proposed class members, without addressing the adequacy of notice, or whether personal notice, at a minimum, was required to be given to each hemophiliac before cutting off his or her rights,/*[10] and clearly undermines the settlement's

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[10]*/The proposed class defined in the settlement documents encompasses the entire population of an estimated 20,000 hemophiliacs infected by factor concentrates (*see* Wadleigh, *supra*, 157 F.R.D. at 414), their families and their estates. Thus, unlike the millions of asbestos victims, the number of class members may have required more direct notice. Even if HIV-confidentiality laws made identification of individuals difficult or impossible, those obstacles to giving personal notice to this

ability to meet the due process and adequate representation requirements of Rule 23. Those class members who were already litigating or represented by lawyers clearly had an advantage in meeting the notice deadline because they were assured of getting actual notice and in knowing the strength of the evidence and legal obstacles in their individual cases, having developed the same in ongoing litigation.

These petitioners were not adequately represented because, *inter alia*, the predominance and superiority tests were swept under the rug, and the "do nothing" provisions of the settlement agreement and notice work a forfeiture and distort the procedure set forth in Rule 23(c)(2) . *See* Raffel v. Medallion Kitchens of Minnesota, Incorporated, 139 F.3d 1142, 1144-1145 (7th Cir. 1998), *citing,, inter alia*, First Nat'l Bank and Trust Co. of Evanston v. First Nat'l Bank of Skokie, 178 Ill. App. 3d 180, 533 N.E.2d 8, 14, 127 Ill. Dec. 390 (Ill. App. Ct. 1988) ("the law abhors a forfeiture and will not enforce a forfeiture clause in a contract if an injustice would result therefrom").

"The final element a class action must show is that a class action 'is superior to other available methods for the fair and efficient adjudication of the controversy.'" Fisher v. Bristol-Myers Squibb Co., 181 F.R.D. 365, 372 (N.D.Ill., E.D., 1998). On the issue of whether members of the class have a superior interest in individually controlling their own prosecution of their personal injury claims, the court in Fisher noted further that:

> The Third Circuit recently observed that "claims for personal injury and death . . . have a significant impact on the lives of the plaintiffs and [they] frequently receive huge awards in the tort system. Plaintiffs have a

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relatively finite group would militate ***against*** certification rather than allow a mandatory opt-out class with a quick 45-day binding deadline to opt out.

> substantial stake in making individual decisions on whether and when to settle." ...This exact language was quoted with approval by the Supreme Court in Amchem, 117 S.Ct. at 2246. . . .

Fisher, 181 F.R.D. at 372-373. It is respectfully submitted the $100,000 compromise settlement amount reflects there is a substantial stake for the individuals involved here.

On the other hand, the $100,000 payment amount evinces that the settlement-only class was actually certified on the basis of the fairness of the settlement to members who might otherwise be legally barred from litigating against the fractionators, as well as other issues that are not common to the membership, but rather are problems that affect some members of the class and not others. This is not an appropriate result, since, "Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted – that if a settlement is 'fair,' then certification is proper." Amchem, 521 U.S. at 622, 117 S.Ct. at 2249. This Court warned that, "If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context. Amchem, 521 U.S. at 623, 117 S.Ct. at 2249-2250. That the settlement's "fairness" was substituted for the Rule 23(b) criteria here is revealed in the district court's statement below that: "Rejecting the entire settlement would be unfair to the thousands of persons who seek to participate in the settlement, and the court rejects that alternative." App. 47a. However, this Court has explained that:

> The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos-exposed persons might gain from the establishment of a grand-scale

> compensation scheme is a matter fit for legislative consideration, ...but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement.

Amchem, 521 U.S. at 622-623, 117 U.S. at 2249 [footnote omitted].

CONCLUSION

For the reasons set forth above, the Petition should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

001331 FEB 13 2001

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

In the Matter

of

EDWARD GADSON, RICHARD KATWARU, KHEMWATIE RAMNAUTH, LISA SIMONELLI and VICTORIA GOVERNALI,

Petitioners,

versus

SUSAN WALKER, BAYER CORPORATION, BAXTER HEALTHCARE CORPORATION, ALPHA THERAPEUTIC CORPORATION AND ARMOUR PHARMACEUTICAL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I

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No. 00-1961

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN RE: FACTOR VII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION APPEAL OF: EDWARD GADSON, KHEMWATIE RAMNAUTH, VICTORIA GOVERNALI, et al.

November 15, 2000, Decided

COUNSEL:

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For SUSAN WALKER, Plaintiff: Roy G. Spece, Jr., Tucson, AZ USA.

For BAXTER HEALTHCARE CORPORATION, Defendant - Appellee: Charles G. Albert, ALBERT, WHITEHEAD & MCGAUGH, Chicago, IL USA.

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For EDWARD GADSON, KHEMWATIE RAMNAUTH, VICTORIA GOVERNALI, REGINALD LEGETTE, LENORA LEGETTE, Appellants: Marya C. Young, Binghamton, NY.

JUDGES:
Before Hon. William J. Bauer, Circuit Judge, Hon. Richard A. Posner, Circuit Judge, Hon. Ilana Diamond Rovner, Circuit Judge.

OPINION:

ORDER

This is a sequel to our opinion reported at 159 F.3d 1016 (7th Cir. 1998), and to a subsequent unpublished order reported at 1999 U.S. App. LEXIS 26427, 1999 WL 809729 (7th Cir. Oct. 7, 1999). A statement in the published opinion is dispositive of this appeal: "After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge." 159 F.3d at 1019. The district court enjoined the appellants, members of a class consisting of hemophiliacs who became infected with HIV by contaminated blood solids manufactured by the defendants, from seeking to avoid the settlement of the class action by suing the defendants on the same claim in state court.

Three of the appellants are identically situated to the claimants whose appeals we rejected in our October 7, 1999, order. The other four claim not to have received notice of the proposed settlement, but the district court with ample basis

rejected the claim as factually unfounded. One of these four, Gadson, further claims that he didn't know he had HIV until after the deadline for opting out of the class, which was October 15, 1996. The reason he didn't know is that, though he had every reason to believe that he had not only HIV but indeed full-blown AIDS, having had seizures as early as 1987, he delayed being tested until 1997, at which time he discovered his infection had already proceeded to the AIDS stage. This was an ostrich tactic equivalent to knowledge.

Without acknowledging the statement quoted above from our previous opinion, the appellants make as their major pitch the argument that they are indeed entitled to mount a collateral attack on the settlement, which they claim should not have been entered because among other things the class action was not proper under Fed. R. Civ. P. 23. We acknowledged that the class action might be "questionable," 159 F.3d at 1018, but held that it was not void and could not be collaterally attacked. The appellants have given us no reason to overrule our two-year-old decision.

AFFIRMED.

Nos. 99-1798, 99-1822 & 99-2245

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN RE: FACTOR VII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION; APPEAL OF: AARON T. TALLAKSON, DAMON CHAPPIE, MARK HELM, et al.

September 27, 1999, Submitted

October 7, 1999, Decided

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JUDGES:

Before Hon. Richard A. Posner, Chief Judge, Hon. William J. Bauer Circuit Judge, Hon. Ilana Diamond Rovner, Circuit Judge.

OPINION:

Order

The appellants, several members of the plaintiff class in a class action on behalf of hemophiliacs who consumed blood concentrates infected by the AIDS virus, appeal from the district judge's orders denying their Fed. R. Civ. P. 60(b) motions to set aside the judgment settling the case and enjoining them from bringing collateral suits, attacking or bypassing the judgment, in state court. A materially identical appeal was decided against other dissatisfied class members in *In re Factor VIII or IX Concentrate Blood Products Litigation, 159 F.3d 1016 (7th Cir. 1998).* For the reasons stated in that decision and in the orders of the district court here appealed, the judgments of the district court are

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE
FACTOR VIII OR IX CONCENTRATE BLOOD
PRODUCTS LITIGATION

SUSAND WALKER, Administratix of the Estate
Of Steven Walker, Deceased,
Plaintiff,

v.

BAYER CORPORATION, BAXTER HEALTHCARE
CORPORATION, ALPHA THERAPEUTIC
CORPORATION and ARMOUR PHARMACEUTICAL
COMPMANY,
Defendants.

February 2, 2000

INJUNCTION ORDER

Consistent with the Final Order and Judgment entered in this case on May 8, 1997, the Order Concerning Requests for Late Opt-Outs entered on May 15, 1997, the March 3, 1999 Injunction Order and the March 3, 1990 Order Denying the Rule 60 Motions of Certain Members of the Settlement Class, and pursuant to this Courts authority under the All Writs Act, 29 U.S.C. § 1651, IT IS HEREBY ORDERED THAT:

The following persons are perutanently enjoined from instituting, assigning, maintaining, collecting or prosecuting claims against defendants, or any of them, arising out of all injury, disease, or harm of any kind that the HIV infected

person and members of such persons Claimant Group allegedly suffered as a result of use of factor concentrate processed and distributed during the period from 1978 through 1985, as described in the Settlement Agreement and this Courts final judgment of May 8, 1997: Victoria GovernaLLi; Reginald Legette; Galo and Ideniz Cintron; Edward Gadson; Richard Katwaru and Kherawatie Raninauth; Lisa Simonelli; Frank and Christina Valdez; and Lenore Legette.

DATE: February 2, 2000

ENTER: John F. Grady, United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE
FACTOR VIII OR IX CONCENTRATE BLOOD
PRODUCTS LITIGATION

SUSAND WALKER, Administratix of the Estate
Of Steven Walker, Deceased,
Plaintiff,

v.

BAYER CORPORATION, BAXTER HEALTHCARE
CORPORATION, ALPHA THERAPEUTIC
CORPORATION and ARMOUR PHARMACEUTICAL
COMPMANY,
Defendants.

April 16, 1999

AMENDMENT TO INJUNCTION ORDER OF
MARCH 3, 1999

For the reasons explained in the companion order entered this date, the injunction order entered, by this court on March 3, 1999, is hereby amended by deleting paragraph one and substituting in lieu thereof the following:

1. The putative class actions, Diaz v. Alpha Therapeutic Corporation, Nos. 97 C 8468 and 98 C 627 (N.D,Ill.), are permanently enjoined.

(a) Named plaintiffs Michael and Mary Castille and Joseph Singler are permanently enjoined from instituting, assigning, maintaining, collecting or prosecuting claims

against defendants, or any of them, arising out of any injury, disease, or harm of any kind that the HIV-infected person and members of any such person s Claimant Group allegedly suffered as a result of use of factor concentrate processed and distributed during the period from 1978 through 1985, as described in the Settlement Agreement and this Courts final judgment of May 8, 1997.

(b) Named plaintiffs Celeste Diaz, Mark Laam, Judy Trullinger, Shirley Carlise, and Scott Carthey, having filed timely opt-outs form the Walker class settlement, remain free to commence new lawsuits in appropriate venues. These plaintiffs have stated that they are considering pursuing class litigation in another jurisdiction on behalf of a class consisting of only of persons who timely and properly opted out of the Walker class settlement. This Court expresses no view as to the appropriateness of any such class action. However, Celeste Diaz, Mark Laam, Judy Trullinger, Shirley Carlise, and Scott Carthey are permanently enjoined from instituting, assigning, maintaining, collecting, or prosecuting against defendants, or any of them, any putative class action relating to alleged injuries from factor concentrates that purports to be on behalf of a class that includes any persons other than persons who properly and timely opted out of the Walker class settlement.

The remainder of the injunction order of March 3, 1999 is unchanged.

DATE: April 16, 1999

ENTER
John F, Grady, United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE
FACTOR VIII OR IX CONCENTRATE BLOOD
PRODUCTS LITIGATION

SUSAND WALKER, Administratix of the Estate
Of Steven Walker, Deceased,
Plaintiff,

v.

BAYER CORPORATION, BAXTER HEALTHCARE
CORPORATION, ALPHA THERAPEUTIC
CORPORATION and ARMOUR PHARMACEUTICAL
COMPMANY,
Defendants.

March 3, 1999

ORDER DENYING THE RULE 60 MOTIONS
OF CERTAIN MEMBERS OF THE SETTLEMENT
CLASS

In the case of In Re: Factor VIII or IX Blood Products Litigation, 159 F.3d 1016 (7th Cir. 1998), the Court of Appeals for the Seventh Circuit denied the mandamus petition of certain attorneys who challenged the class action settlement in this case. The attorneys argued that the settlement was void under the Supreme Court holding in Amchem Products, Inc. v. Windsor, 117 S.Ct. 2231 (1997) and that it was for various additional reasons beyond the authority of this court to approve. The Court of Appeals rejected most of the arguments and denied the mandamus petition. Some of these same attorneys have now filed

motions under Rule 60 of the Federal Rules of Civil Procedure raising essentially the same arguments on behalf of clients who did not opt out of the settlement.[fn]1 . They insist that, not having been parties to the mandamus petition, the clients are not bound by the Seventh Circuit Decision.[fn]2

Responses to the Rule 60 motions have been filed by the fractionator defendants and lead counsel for the plaintiff class. They contend that the Seventh Circuit decision in the mandamus proceeding is the law of the case, applicable to these movants, and that the movants arguments are without merit in any events.

DISCUSSION

The Question of Prior Adjudication

The Seventh Circuit will determine for itself whether its decision in the mandamus proceeding establishes the law of this case on the points raised by the movants. But what the Seventh Circuit held in the mandamus case is binding on this court in any event. Movants assumption that they are writing on a clean slate ignores the doctrine of stare decisis.

We are not persuaded by any of the arguments in the present motions to depart from anything we said in the Order Concerning Certain Claims for Attorneys Fees dated February 18, 1998.3 Therefore, we will be guided not only by the Seventh Circuit decision in the mandamus proceeding, but also by the order of February 18, 1998. in that order, we addressed most of the arguments advanced by the present movants and will not repeat that discussion here.

The Merits

The Mull & Mull-Arceneaux movants make three arguments. The Mark Jay Bern novants adopt those

arguments and add a fourth which is based on the fact that their claims allegedly arise under the laws of New York. A brief discussion will dispose of each of the four arguments.

I.

The "New Offer" Argument

Movants argue that the terms of the release submitted by the fractionators make clear that the settlement terms were being abrogated and that a "new offer" was being made to each of the class members. Because the movants were free to reject the offer, they have elected to do so. We dealt with this argument in our February 18, 1998 order concerning attorneys fees. we reject the argument again for the reasons explained in that order. (Order of February 18, 1998, pp. 4-7, 14—17).

II.

The Voidness Argument

Movants argue that the order of May 8, 1997 approving the class settlement is void under the Amchem case. We rejected this argument in our order of February 18, 1998, (Id. at 9-11), as did the Seventh Circuit in its mandamus ruling. We adhere to our own previous decision, and, more importantly, follow the decision of the Seventh Circuit.

III.

The Argument That There Was No Case or Controversy

The movants argue, simply on the basis that this was a "settlement only" class, that the "case or controversy" requirement of Article III of the Constitution was not met... They concede in their reply brief (p. 21) that the Seventh Circuit held this court did have Article III jurisdiction to enter the order of Nay 8, 1997, but argue that " . . . this holding is

impossible to reconcile with prevailing Supreme Court jurisprudence." This is an argument movants will have an opportunity to make to the Seventh Circuit. As far as we are concerned, the Walker Case, in which we certified the settlement only class, can only be viewed as part of a larger litigation in which the parties were very much opposed to each other until the Walker settlement was reached. Movants would ignore this reality and regard the Walker settlement as coming out of the blue, with no connection to the long controversy which proceeded it and which accounted for the very existence of this multidistrict litigation.

IV.
The New York Revival Statute

The movants represented by Attorney Bern argue that the New York revival statute is a "changed circumstance" which entitles them to set aside the judgment order of May 8, 1997, approving the settlement. Plaintiffs and defendants point out that the possibility of this New York legislation was known in 1996, long before this court approved the settlement and long before the opt-out date. Passage of the legislation was not a certainty, of course, but it was certainly foreseeable. It is not in our view a circumstance that would justify setting aside the settlement for these claimants and allowing them to proceed with individual actions. Defendants have cited a number of cases for the proposition that a change in the statute of limitations is not a proper basis for reopening a judgment, and we agree with these cases.[fn]4

The Question of Timeliness

Rule 60 motions must be asserted within a reasonable time after judgment is entered. Movants argue that void judgments may be attacked at any time. We believe the May 8, 1997 judgment is not void and that movants are limited by the reasonable tune requirement. Considering the lapse of tine

itself, and the substantial changes of position made by the numerous participants in the settlement in the meantime, we believe novants' delay in presenting these motions is inexcusable.

CONCLUSION

For these reasons, the Rule 60 motions of class members represented by Mull & Mull and Robert Arceneaux, by Marc Jay Bern and by Roy G. Spece are denied.

DATE: March 3, 1999
ENTER:
John F. Grady United States District Judge

FOOTNOTES

[fn]1 The attorneys who sought mandamus were Mull & Mull, represented by Robert Arceneax. They have filed one of the two Rule 60 notions. The other 'motion was filed by attorney Mark Jay Bern on behalf of several class members who assert that their claims arise under the laws of New York. Mr. Bern was not one of the petitioners in the mandamus proceeding.

The final movant is Jane Doe, represented by attorney Roy G Spece. She joins in the motion and adopts the arguments made by the plaintiffs represented by Mr. Arceneaux.

[fn]2 This is reminiscent of the argument these same attorneys made as to why they were not "bound" by the order of May 8, 1997 when they sought to collect fees that were barred by that order: they were not "parties" to the case, but only attorneys for parties. See Order Concerning Certain Claims for Attorneys Fees, February 18, 1998, p. 8. That

argument was unsuccessful then, but this time they are correct.

[fn]3 This is the order that prompted the mandamus petition.

[fn]4 Defendants do not concede that the revival statute is applicable to most of the Bern movants in any event. They argue that many of these movants have claims with no connection to New York and have filed their cases in New York "in the misguided hope that they would be able avail themselves of the revival statute. Defendants' brief, p. 14 n. 11. This court has no basis for an opinion as to whether all of the Bern movants would in tact be entitled to the two-year window, but if any of them are not, it would be unfortunate indeed if we were to grant their motion for relief from the judgment and then see them impaled on the statute of limitations when they sought to proceed with individual claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE
FACTOR VIII OR IX CONCENTRATE BLOOD
PRODUCTS LITIGATION

SUSAND WALKER, Administratix of the Estate
Of Steven Walker, Deceased,
Plaintiff,

v.

BAYER CORPORATION, BAXTER HEALTHCARE
CORPORATION, ALPHA THERAPEUTIC
CORPORATION and ARMOUR PHARMACEUTICAL
COMPMANY,
Defendants.

March 3, 1999

INJUNCTION ORDER

Consistent with the Final Order and Judgment in this case on May 8, 1997, and the Order Concerning Requests for Late Opt-Outs entered by the Court on May 15, 1997, and pursuant to this Court's authority under the All Writs Act, 28 U.S.C. § 1651, IT IS HEREBY ORDERED THAT;

1. The putative class action, Diaz v. Alpha Therapeutic Corporation, Nos. 97 C 8468 and 98 C 627 (N.D.Ill.), is permanently enjoined. Named plaintiffs Celeste Diaz, Mark Lawn, Judy Trullinger, Shirley Carlise, and Scott Carthey, who filed timely opt-outs from the Walker class settlement, remain free to file individual lawsuits in appropriate venues. Named plaintiffs Michael and Mary

Castille and Joseph Singler are permanently enjoined from instituting, assigning, maintaining, collecting or prosecuting claims against defendants, or any of then, arising out of any injury, disease, or harm of any kind that the HIV infected person and members of such person's Claimant Group allegedly suffered as a result of use of factor concentrate processed and distributed during the period from 1978 through 1985, as described in the Settlement Agreement and this Court' s final judgment of May 8, 1997.

2. The following persons who failed timely to opt out of the Walker class settlement are permanently enjoined from instituting, assigning, maintaining, collecting or prosecuting any such claims against defendants as those described above in paragraph 1: Michael Akers; Michael Barrington; Lan Dusty Nguyen; Michael and Carolyn Coons; Phillip Campbell; Matthew Damon Chappie; Michael Davon; Trina Geraldo; Mark S. Helm; Sylvan Hart; Victor K. Horr; mother of Henry Lay; Anthony Lindgren; Shawn A. Robison; Eric Somme; Aaron Tallakson; Victoria Tody; Carl Weixler; and Lillian D. Noblett and Enid F. Eckert, the heirs of Ross Eckert.

Date: March 3, 1999

Enter:

John F. Grady, United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE
FACTOR VIII OR IX CONCENTRATE BLOOD
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SUSAND WALKER, Administratix of the Estate
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BAYER CORPORATION, BAXTER HEALTHCARE
CORPORATION, ALPHA THERAPEUTIC
CORPORATION and ARMOUR PHARMACEUTICAL
COMPMANY,
Defendants.

March 3, 1999

MEMORANDUM OPINION ON FRACTIONATOR
DEFENDANDTS' MOTION TO ENJOIN CERTAIN
CLASS WENRERS FROM LITIGATING DUPLICATIVE
LAWSUITS

In a separate order entered-this date the court is denying the motions of certain class members to relieve them from the bar against proceeding with other lawsuits that was contained in the order of May 8, 1997, approving the class settlement in this case. We now turn to a motion the fractionator defendants have made to enjoin the lawsuits these same plaintiffs have filed or may intend to file in other courts.

In today's companion order, we pointed out that the arguments advanced by the Rule 60 movants were essentially

the same ones their attorneys had made in the litigation over attorneys fees. That is, they argued that the Walker settlement was void under Amchem Products Inc. v. Windsor, 117 S. Ct. 2231 (1997), and that the settlement is not binding on these plaintiffs in any event because defendants abandoned the settlement and extended "new offers" to the plaintiffs, which they were free to refuse. We noted that we have previously addressed these arguments and found it unnecessary to do so again. We will treat the "voidness" and "new offer arguments in the same way here, referring to them only to the extent necessary for context.

The present motion seeks to enjoin the prosecution of lawsuits brought by these attorneys in state and federal courts on behalf of class members who elected not to opt out of the class and on behalf of opt—outs who purport to serve as class representatives of class members who did not opt out. Defendants' argument is that these plaintiffs are barred by the order of May 8, 1997, from proceeding with these separate actions, either individually or as purported class representatives. Defendants invoke our authority to enforce the terms of the settlement pursuant to Rule 23 of the Federal Rules of Civil Procedure as well as our power under the All Writs Act, 28 U.S.C. § 1651(a). We enjoined the attorneys from seeking fees apart from the cost and fee fund under the same authority. See Order of February 18, 3.998 at 20 n.8. In its mandamus decision, the seventh Circuit approved the injunction as a proper exercise of this court's authority under the All Writs Act. In Factor VIII or IX Blood Prods. Litig., 159 F.3d at 1020.

Realizing that this court has previously considered and rejected their basic arguments the plaintiffs, while renewing those arguments, oppose the requested injunction on additional grounds, as well. The new arguments still depend upon the basic notion that the May 6, 1997, order is void under Amchem and that the "new offers" have abrogated the settlement.

Plaintiffs contend that the injunction requested by

defendants under the All Writs Act is inappropriate because an exists:, defendants could: assert the May 8, 1997, order as res judicata in each of the actions they seek, to enjoin. Plaintiffs point to certain statements of this court at the status conference of November 18, 1998, where we suggested that this approach would be preferable to an injunction.

In retrospect, the court's remarks at the November 18 status conference were premature. The issue had not been briefed at that time, and we had not fully considered the ramifications of our suggestion. Defendants correctly point out that it would be unreasonable for them to have to raise a res judicata. defense in each of the cases these plaintiffs have filed or might file in the future. Raising the defense would involve the need to acquaint a number of different judges with the complex legal and factual issues in this litigation and, of necessity, the possibility of inconsistent rulings. The party who lost the argument in each trial court would be sure to appeal, adding further expense and the possibility of inconsistent appellate rulings. In short, the plaintiffs propose an inordinately expensive, duplicative, and ineffective means of resolving the question of whether the order of May 8, 1997, bars additional litigation by these plaintiffs. In contrast, an injunction by this court, reviewable only by an appellate court already familiar with the controversy, provides an incomparably better alternative. This case is the paradigm situation to employ the All Writs Act.

The attorneys who represent these plaintiffs could have asserted the same kind of argument in the fee controversy They could have argued that an injunction was, not necessary because there was an available alternative: defendants could raise 'the May 8, 1997, order as a bar to the collection of any percentage fees where the attorneys might obtain a judgment against the defendants on behalf of a client, or as a defense to any suit brought directly against the defendants by the attorneys on one or more of the theories of liability (interference with contract, fraud, etc.) they had asserted in that controversy. However, the attorneys did not

make that argument, not did the Court of Appeals suggest that this court should have stayed its hand because of the availability of such an alternative.

Plaintiffs argue that in order to invoke the All Writs Act, this court must have independent jurisdiction over the persons to be enjoined. Plaintiffs are wrong. The Act applies to them because it extends to all persons who wrongfully seek to frustrate a federal court order, whether or not they were ever parties to the case in which the order was entered. United States v. New York Tel. Co. 434 U.S. 159, 174 (1977); In re Baldwin-United Corp., 770 f.2d 322, 338 (2d Cir. 1985). Some of these plaintiffs are members of the settlement class who did not opt out, and there can be no question of our jurisdiction over them. The All Writs Act gives us jurisdiction over the other plaintiffs who did opt out but have filed class actions in which they purport to represent class members who did not opt out.

The second major argument made by the plaintiffs is a farrago of previous contentions attacking the validity and continued viability of the settlement. They contend that the settlement is void under Amchem, that the tendered releases departed front the terms of the settlement and therefore constituted new offers, and that there is no consideration for the releases as tendered. Therefore, plaintiffs argue the settlement is a nullity as applied to, them, and this court has no authority to enforce the settlement order.

Plaintiffs contend in this connection that to require any release in the settlement of a class action is "virtually unheard of." The contention that no release can be required as a condition of payment is another example of something plaintiffs' attorneys could have raised on behalf of their clients before the settlement was approved. The settlement agreement approved by the court after extensive hearings specifically provided for releases. That requirement was particularly appropriate in this case, where entitlement to the payments would belong not only to individuals but sometimes to "claimant groups." The possibility of disputes

among group members was easily foreseeable Obtaining releases from each member of the group was an obvious way of extinguishing all claims in the group. Not one word was uttered by these attorneys or their clients, in opposition to the release requirement and we entered the order of May 8, 1991, in the belief that the settlement agreement was satisfactory to all class members who had not objected to it. For these attorneys to a argue at this late date that the requirement of any release at all renders the order of May 8, 1997, somehow unenforceable is a repetition of the kind of bad faith they showed in their delayed challenge to the limitation on their fees.

We continue to believe that the order of May 8, 1997, is valid and enforceable. Defendants bargained for the benefit of the order, and they are entitled to that benefit. The only sensible way to enforce the portion of the order that bars the filing of other lawsuits is. to enjoin these plaintiffs from filing or prosecuting such suits. Accordingly, the proposed injunction order tendered by the defendants will be entered, with one modification.[fn]1 Two of the cases that defendants seek to enjoin, the Diaz and Harrington suits, were removed from state court to federal court and then transferred here as part of the MDL. Plaintiffs have pending motions to remand those cases to state court for an alleged lack of federal subject matter jurisdiction. Defendants argue that it is unnecessary to decide the remand motions if the suits are enjoined, and we agree. But something has to be done with the remand motions. Denying them as moot would seem inappropriate where there is an unresolved challenge to federal jurisdiction.. We suggest that defendants withdraw their opposition to remand. This court could then remand the cases to the state courts where they were filed. The cases would be subject to the injunction, and plaintiffs would be unable to prosecute them. Defendants could then file in the state courts whatever motions would be appropriate in light of the injunction.

Defendants should notify the court and the Diaz and

Harrington plaintiffs by March 9, 1999, as to whether they withdraw their opposition to plaintiffs' remand motions. If they do, the court will grant the motions.

CONCLUSION

For the foregoing reasons, Fractionator Defendants' Motion to Enjoin Certain Class Members from Litigating Duplicative Lawsuits is allowed. The injunction will be entered this date.[fn]2

DATE: March 3, 1999

ENTER:
John F.Grady, United States District Judge

[fn]1 The modification is that instead at limiting the opt—out plaintiffs to filing individual suits "in their home states" they will be permitted to file individual suits "in appropriate venues."

[fn]2 The plaintiff Jane Doe, represented by Roy G. Spece, has a separate motion pending which seeks relief from the May 8, 1997 order, on the ground that the defendants agreed to allow her to opt out of the settlement class. The court has requested further briefs on that motion. In the event the motion is granted, we will vacate the injunction as to plaintiff Jane Doe. If we deny the motion, the injunction will remain in effect as to her.

Nos. 98-1438, 98-1770, and 98-1629

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In re Factor VIII or IX Concentrate Blood Products Litigation, Appeals of Roy G. Spece, Jr., Rose Marie Ibanez, and Mull & Mull. In re Mull & Mull.

September 8, 1998, Submitted

October 19, 1998, Decided

JUDGES:
Before Posner, Chief Judge, and Bauer and Rovner, Circuit Judges.

OPINIONBY:
POSNER

OPINION:

Petition for a Writ of Mandamus.

Posner, Chief Judge. Five years ago, a nationwide class action was filed on behalf of hemophiliacs who had been infected in the early 1980s with AIDS virus (HIV) contained in blood solids manufactured and sold by the defendant drug companies for the treatment of hemophilia. Blood solids are manufactured from blood sold or donated to blood banks and the defendants had failed either to screen the blood for HIV

or to process the blood in a way that would kill any HIV in it. The class claimed that the defendants were negligent in not taking these precautions. After we granted mandamus, on grounds unnecessary to recite here, to decertify the class, In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995), the parties' lawyers continued to negotiate over a mass settlement of the estimated 6,000 suits that either had been or were expected to be filed by or on behalf of infected hemophiliacs. The negotiations resulted in the certification of the class, though this time for settlement only, and the entry, last year, of a consent decree. The decree provided that each member of the class who was willing to release the defendants from liability would receive $ 100,000 net of attorneys' fees and that the defendants would establish a $ 40 million fund out of which attorneys' fees would be paid in amounts to be determined by the judge. The decree extinguished the rights of the lawyers for those class members who signed a release to enforce their contingent-fee contracts with such members, because it provided that "no attorney's fee shall be payable by any class members other than those fees approved by the Court to be payable from the [$ 40 million] fund." Contingent-fee contracts generally entitle the lawyer to 33 to 40 percent of any judgment or settlement. In the case of a settlement that yielded a net of $ 600 million to the claimants, this would mean lawyers' fees of $ 300 to $ 400 million (since a gross settlement of $ 900 million would yield the claimants $ 600 million if their lawyers were entitled to 33 percent), not $ 40 million, actually less than $ 40 million since the fund was to be the exclusive source of court costs as well as attorneys' fees.

The few appeals from the consent decree were voluntarily dismissed. The process of obtaining releases from members of the class began and is now substantially completed, with some 5,200 class members having executed releases and been paid $ 100,000 each. Several hundred of these class members are represented by the lawyers who have filed, on their own behalf and not on behalf of their clients, the two appeals and

the petition for mandamus that are before us for decision today.

These lawyers accuse the lawyers for the class and for the defendants--groundlessly, as far as we can tell--of defamation, bait-and-switch tactics, hoodwinking, infamy, dishonesty, illegality, intimidation, extortion, hypocrisy, hysteria, and Marxism. Yet they did not oppose the settlement. They objected initially to the amount of the settlement but their objection was rejected after a hearing and they did not renew their opposition or appeal from the consent decree, of which their clients have, as we have noted, taken full advantage. And at no time did they object to the attorney's fee provision of the settlement. Only after the time for appealing from the consent decree had run did these lawyers advise the district court of their view that the consent decree was invalid insofar as it limited their fees and barred them from trying to enforce their contingent-fee contracts with their clients. They also instituted collateral attacks on the settlement in the state courts of Louisiana, which resulted in a temporary cessation of payments by the defendants to the clients of these lawyers. The district judge responded to these shenanigans by enjoining the lawyers from attempting to enforce their contingent-fee contracts or liens based upon them, and he declared the contracts void to the extent that they are inconsistent with the consent decree. The lawyers have challenged his actions both by appealing and by seeking mandamus.

The injunction is appealable without regard to finality, 28 U.S.C. § 1292 (a)(1), and if the appellants are correct that the consent decree is "void," then the injunction, being ancillary to it, would fall with it. If the consent decree were truly void, the injunction based on it would presumably also be void, and so unappealable because a void order imposes no obligations; but in that event mandamus would lie to vacate the injunction. DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp., 14 F.3d 1163, 1166 (7th Cir. 1994). The settlement embodied in the consent decree may well be

questionable, both in its form (cf. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997), disapproving "settlement classes," albeit in different circumstances from those of this case) and in its terms. That all the members of the class should receive the identical payment, even though the strength of their cases (some of which appear to be barred by the statute of limitations) and the amount of their damages must vary greatly, is downright weird. But there is no question of the district court's having exceeded its jurisdiction in entering the decree. All the requirements of Article III were satisfied.

Even if they had not been, it is unlikely that the settlement could be set aside at this late date. The appellants argue that "when subject matter jurisdiction is lacking or due process has been denied, the final judgment is void, and its nullity must be recognized in any collateral proceeding in which it is asserted as binding." This is an overstatement. The principle that jurisdictional defects may be noticed at any time is limited, as we explained in In re Edwards, 962 F.2d 641, 644 (7th Cir. 1992), by the equally important principle that litigation must have an end. After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge. Stoll v. Gottlieb, 305 U.S. 165, 171-72, 83 L. Ed. 104, 59 S. Ct. 134 (1938); In re Edwards, supra, 962 F.2d at 644; Restatement (Second) of Judgments § 12 (1982). (On the significance of participation, see, e.g., Williams v. General Electric Capital Auto Lease, Inc., 159 F.3d 266, 1998 U.S. App. LEXIS 24537, 1998 WL, at * - (7th Cir. 1998).)

The practical wisdom of this rule is shown by the present case. The defendants have paid out more than $ 500 million. Are they now to go around to all 5,200 class members whom they have paid and ask for their $ 100,000 back so that this litigation can return to its starting point? Not that the

appellants are asking for this. They just want more fees. But the $ 40 million cap on attorneys' fees was an important part of the deal from the defendants' standpoint, given their commitment to pay each class member a net of $ 100,000, so that the attorneys' fees would have to come out of the defendants' pockets. If the cap is to be lifted the entire settlement must be rescinded and the parties returned to square one by the return of the moneys paid out under it. This would also have to happen if the appellants decided to seek additional fees not from the defendants but from their own clients; the defendants wouldn't care, but of course the clients would be entitled to rescind their releases, which had been premised on the receipt of $ 100,000 net.

We are mindful that Fed. R. Civ. P. 60(b)(4) authorizes, and the cases interpreting it require, "void" judgments to be set aside at any time. United States v. Indoor Cultivation Equipment, 55 F.3d 1311, 1317 (7th Cir. 1995); Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 400 (7th Cir. 1986). But set aside by the district court; it is there that the motion must be filed; and the appellants have never filed such a motion. But we don't want to give them false hopes. They will gain nothing by trying to file such a motion in the future. For "void" is just the name we give to those judgments that can be set aside without regard to the usual limitations on challenging judgments after they have become final by exhaustion of appellate remedies; and as the authorities cited in the preceding paragraph make clear, a judgment is not to be pronounced void merely because the court that entered it may not have had jurisdiction. And, needless to say, substituting for a 60(b)(4) motion in the district court a petition for a writ of mandamus in the court of appeals (cf. Cohen v. Illinois Institute of Technology, 581 F.2d 658, 662 (7th Cir. 1978); Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66, 71 n. 3 (2d Cir. 1973) (Friendly, J.)) shouldn't enlarge the meaning of "void." Indeed, given the rule, the only occasion for using mandamus--a last resort, a safety hatch where no other vehicle for obtaining judicial relief is

available, e.g., Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35, 66 L. Ed. 2d 193, 101 S. Ct. 188 (1980) (per curiam)--to get rid of void judgments would be where Rule 60(b)(4) relief had been sought in the district court and denied there, and the order denying it was unappealable, as in Moses v. Banco Mortgage Co., 778 F.2d 267, 275 (5th Cir. 1985). That is not this case.

Rule 60(b)(3) allows judgments to be set aside on the ground of fraud, and the appellants argue that the settlement was procured by fraud. But this rule (unlike 60(b)(4)) has a time limit of one year, which the appellants have now exceeded, for as we have said they never filed a Rule 60(b) motion, and so it is now too late for them to file such a motion bottomed on subsection (3). Anyway their allegations of fraud are fantastic and even preposterous. The most fantastic is the claim by one of them that he was on the verge of negotiating a $ 1.8 billion settlement with the defendants when the class lawyers by a dastardly maneuver preempted him by agreeing to accept a measly $ 600 million. If this were true, which we do not for a moment believe, the lawyer would have been ethically obligated, as well as impelled by powerful motives of self-interest, to bring this to the attention of the district judge in the hearing that the judge conducted (and the lawyer attended) on the fairness of the proposed settlement.

Even if someone might have been or might still be able to challenge the settlement, presumably someone who had not had notice of or a fair opportunity to participate in the proceeding yet had been adversely affected by it, it is not these lawyers. Having participated in the settlement proceeding and having failed to make timely objection to it, they are barred by the principles of waiver and equitable estoppel from challenging the settlement after it has become final and the defendants have paid and the class members have received hundreds of millions of dollars. Skelton v. General Motors Corp., 860 F.2d 250, 259 (7th Cir. 1988).

Since the settlement stands, the judge's power to issue the injunction (and related declaratory relief) against these lawyers' enforcing the contingent-fee contracts or liens based upon them was a proper exercise of the court's jurisdiction under 28 U.S.C. § 1651 ("all writs") to prevent interference with its orders. E.g., United States v. New York Telephone Co., 434 U.S. 159, 172, 54 L. Ed. 2d 376, 98 S. Ct. 364 (1977); Williams v. General Electric Capital Auto Lease, Inc., supra, at * ; United States v. Silva, 140 F.3d 1098, 1103 (7th Cir. 1998); In re VMS Litigation, 103 F.3d 1317, 1324 (7th Cir. 1996); In re "Agent Orange" Product Liability Litigation, 996 F.2d 1425, 1431 (2d Cir. 1993). The settlement agreement guaranteed all acceding class members $ 100,000 free of attorneys' fees. The appellant lawyers are now claiming the right to sue their clients for a third or more (whatever the contingent-fee contract provides) of the $ 100,000. This claim is not only a dagger aimed at the heart of the settlement and therefore properly enjoinable; it raises serious ethical concerns. Having induced their clients to sign releases under the impression that the consideration for the release was $ 100,000 net, the lawyers now assert a right to turn on the clients and take for their own benefit a substantial fraction of that purportedly net recovery. It is true that they don't want to sue their clients, or even to undo the settlement; they would be quite content to take the $ 15 million or so that they think their contingent-fee contracts entitle them to out of the $ 40 million costs and attorneys' fees fund, and indeed would greatly prefer this route to having to sue hundreds of individuals. But if they did get what they are seeking out of the fund, the settlement would come apart, to the detriment of their clients, because there wouldn't be enough money for the other lawyers. In any event, the appellants' insistence that notwithstanding the consent decree the contingent-fee contracts remain valid and enforceable--which means enforceable against the clients who signed them--created a sufficient danger to the clients (as well as causing the delay in payment to them that we mentioned earlier) to warrant the

district court's enjoining these lawyers from trying to enforce the contracts.

The order of the district court is

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE
FACTOR VIII OR IX CONCENTRATE BLOOD
PRODUCTS LITIGATION

SUSAND WALKER, Administratix of the Estate
Of Steven Walker, Deceased,
Plaintiff,

v.

BAYER CORPORATION, et al.,
Defendants.

May 15, 1997

ORDER CONCERNING REQUESTS FOR
LATE OPT-OUTS

On May 8, 1997, the court entered a final judgment order finding the class action settlement to be fair, approving the settlement and directing the parties to proceed with implementation of the settlement agreement. Paragraph 14 of the judgment order bars the filing of any suit against any of the defendants by any class member who did not file a timely opt-out notice. The deadline for opt-outs was October 15, 1996.

Notwithstanding the order of May 8, the court has reserved jurisdiction to permit late opt-outs in extraordinary circumstances. As explained at the hearing held on May 6, 1997, however, this does not include a mere change of mind by a class member concerning the strength of his case based on "new information" acquired subsequent to October 15, 1996. As we pointed out at the hearing of May 6, the "new

information" is not new and had been well known to the members of plaintiffs' Steering Committee for years prior to execution of the settlement agreement on August 13, 1996. Many class members appear to have been misled about this by persons who have been encouraging them to request permission for late opt—outs. The purpose of this order is to make clear that the judgment order of May 8 is a bar to the filing of any individual suits by class members who did not opt out by October 15, 1996. A copy of this order is being sent to each of the persons who have written the court in the past few months requesting a late opt-out.

The kind of extraordinary circumstance the court has in mind is something that would have prevented the class member from making an intelligent decision to opt out prior to the deadline. Thus far, the court has been apprised of no such circumstance. Almost all of the persons who have written the court have based their opt-out requests on vague references to "new information". they have been supplied. If this is the information the court discussed at the hearing of May 6, it is misinformation and it does not constitute a valid reason for a late opt-out.

DATED: May 15, 1997

ENTER:

John F. Grady, United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE
FACTOR VIII OR IX CONCENTRATE BLOOD
PRODUCTS LITIGATION

SUSAND WALKER, Administratix of the Estate
Of Steven Walker, Deceased,
Plaintiff,

v.

BAYER CORPORATION, et al,
Defendants.

May 8, 1997

FINAL ORDER AND JUDGMENT RELATING TO
SETTLEMENT

This cause having come before the court for consideration of a final Settlement Agreement and for entry of a Final Order and Judgment, and after full briefing and hearings pursuant to notice where proponents and objectors were heard, and after consideration of the entire record in these consolidated proceedings, it is HEREBY ORDERED as follows:

1. The court has subject matter jurisdiction over this action, and all matters that relate to the settlement.

2. The court has personal jurisdiction over the representative plaintiff, Susan Walker; over the settlement class members; and over the fractionator defendants (Alpha, Armour, Baxter and Sayer).

3. By order entered on August 14, 1996, this

court certified a Settlement Class defined as all living persons who, as of August 13, 1996, are, and all deceased persons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions and territories, and persons who are not, and deceased persons who were not, citizens or permanent residents of the United States but who are, or whose personal representatives are plaintiffs in lawsuits against one or more of the Fractionators that, as of January 1, 1996, were pending in any court of the United States, and who are or were;

(a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates);

(b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also KIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates);

(c) all children of persons in sections (a) or (b) who as a result of their relationship with persons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent

allegedly transmitted by such Factor concentrates);

(d) all persons who are not or were not MIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a), (b), or (c), based upon the use of such Factor Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and support, fear of AIDS, hepatitis or any other infectious agents, emotional distress, or claims for wrongful death under an applicable wrongful death statute;

(e) parents or guardians, on behalf of any minor or otherwise legally incompetent class members in sections (a), (b), (c) or(d); and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators, administratrices or personal representatives of any deceased class members in sections (a), (b), (c), (d) or (e).

Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or more of the Fractionators (including claims against one or more of the Fractionators and one or more non—Fractionators), as a result of which

a payment or payments totaling $100,000.00 or more have already been made by one or more of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled for $100,000.00 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has previously settled in any amount with all four of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled in any amount with one or more of the Fractionators or who is a member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to judgment in a trial court, unless such person has his or her own Direct Claim that has not gone to judgment, provided, however, that a person against whom judgment has been entered for lack of prosecution of a claim shall not be excluded from the Settlement Class;

(e) any person who submits a timely written request to be excluded from the Settlement Class; and

(f) any person who is a plaintiff in a case in which trial begins between the date of conditional certification and the date of final certification of the settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

4. By order entered on August 14, 1996, this court preliminarily approved the Factor Concentrate Litigation Settlement Agreement dated August 13, 1996, and authorized dissemination of Notice of the Settlement Agreement to the Settlement Class Members.

5. The court finds that, pursuant to a Plan of Notice approved by this court, notice of the proposed Settlement Agreement was timely mailed to the Settlement Class Members, published as ordered in three (3) issues of USA Today, posted on the Internet, and provided to PR Newswire for informational releases to radio, television and print media in the United States.

6. The court finds that the notice given to the Settlement Class Members, which was approved by this court, fully and accurately informed the Settlement Class Members of all relevant and material elements of the proposed Settlement Agreement and afforded them an adequate time to decide whether to opt out of the settlement.

7. The court finds that the notice given to the Settlement Class Members constituted the best notice practicable under the circumstances, that the notice

constituted valid, due and sufficient notice to all Settlement Class Members, and that the notice given was in such manner as directed by the court and in full accordance with Rule 23 of the Federal Rules of Civil Procedure.

8. On November 25, 1996, this court held a hearing pursuant to notice to consider final approval of the settlement. The court has considered the objections of persons opposed to the settlement and finds nothing in the objections to justify rejection of the settlement. The objections include:

(a) the $100,000.00 settlement payment per claimant group is inadequate for the loss suffered;

(b) insurance companies will receive the settlement proceeds or the recipients will be rendered ineligible for government assistance;

(c) infection by Factor Concentrate used in the treatment of a disease called Von Willebrand Disease should qualify for inclusion in the settlement;

(d) each family member should be able to assert his or her own independent claim, rather than being part of a "claimant group" of the infected person;

(e) persons who have litigated and lost prior cases should not be barred from the settlement;

(f) the settlement should be coupled with or made contingent upon

passage by Congress of the "Ricky Ray Hemophilia Relief Act"; and

(g) certain persons outside the United States who are neither citizens nor permanent residents and who wished to be included in the settlement should be included.

These objections are further discussed in section 10(E) infra.

9. In April 1997, the court received letters from Charles R. Kozak and Thomas W. Mull,: two attorneys who. represent: substantial numbers of class members, asserting that plaintiffs' Steering Committee had not, prior to recommending the settlement, taken adequate account of certain liability theories Messrs. Kozak and Mull believe are substantially more likely to result in recoveries against the defendants than are the theories favored by the Steering Committee. The allegation by Messrs. Kozak and Mull was that, by ignoring the more viable liability theories, the Steering Committee failed in its obligation to obtain the maximum settlement value for the class. Obviously, this contention went to the fairness of the proposed settlement, and, after a further exchange of correspondence with Messrs. Kozak and Mull and Mr. David S. Shrager, lead counsel for the class, the court determined that a further fairness hearing was required. That hearing was held on May 6, 1997, pursuant to notice. Mr. Kozak, Mr. Shrager, various members of the Steering Committee, counsel for the defendants, various other attorneys representing class members, and various members of the class appeared and expressed their views.. At the conclusion of the hearing, the court was left with no doubt that plaintiffs' Steering Committee was fully aware of the liability theories referred to by Messrs. Kozak and Mull and had fully considered them in determining whether to recommend the settlement. It became clear that.,

contrary to their assertions, Messrs. Kozak and Null had no "new information" that was relevant to the fairness of the proposed settlement. In fact, they stated that they were not opposing the settlement but instead were only urging the court to permit late opt-outs on the basis that the class had only recently been advised of the "new information" they had supplied. For a number of reasons the court explained at the conclusion of the session, this suggestion was rejected.

10. The court has considered the settlement guided by the factors set forth in Gautreaux v. Pierce, 690 F.2d 616, 631 (7th Cir. 1982). See also Donovan v. The State of Fitzsimmons, 778 F.2d 298, 908 (7th Cir. 1985). These include the following factors:

(A) The Strength of Plaintiffs' Case on Merits

Most class members are faced with significant problems of limitations, proximate cause and product identification, as well as the task of persuading a jury that defendants should be found negligent on the basis of acts and omissions that preceded discovery of the AIDS virus. (Only a few jurisdictions recognize strict liability in blood product cases.) These challenges have largely accounted for the fact that, of the 13 cases tried prior to preliminary approval of the settlement, 12 resulted in defense judgments. In one of those cases, a jury verdict for the plaintiff was set aside and that decision was affirmed on appeal. Jones v. Miles Lab. Inc., 705 F.Supp. 561 N.D. Ga. 1987), aff'd. 887 F.2d. 1576 (11th Cir. 1989). Two of the 13 cases were reversed on appeal (one is currently subject to retrial) . In one of them, plaintiffs had prevailed at trial, Christopher V. Cutter Lab, 53 F.3d. 1134 (11th Cir. 1995), and in the other case, defendants had prevailed. Cruca v. Alpha Therapeutic Corp., 51 F.3d 638 (7th Cir. 1995).

After preliminary approval of the settlement, two additional cases have been tried to verdict. In the first, JKB v. Armour Pharmaceutical Co., No. 49001 9312—CT—1236 (Marion Superior Court, Indiana), a $2 million verdict was returned in favor of plaintiffs and against a single defendant. There was no issue as to product identification. The plaintiff's decedent was a minor and therefore there were no arguable statute of limitations issues. Indiana has a strict products liability statute, Ind. Code §33-1-1.5—1. The jury returned a general verdict, without differentiating between negligence or strict liability. The judgment is subject to appeal.

In the second case, Howray and Brown v. Alpha Therapeutic and Armour Corp. in the District Court for Harris County, Case No. 94-049929—A, a verdict was returned in favor of both defendants, Alpha and Armour, and against two infected plaintiffs, after four weeks of trial.

The results of the trials to date favor approval of the settlement because the settlement is a guaranteed sum certain for claimants who have elected to participate.

(B) Stage of Proceedings and Amount of Discovery Completed

This MDL litigation consists of. over 200 federal law suits which have been consolidated for pretrial discovery purposes by the Judicial Panel on Multidistrict Litigation. Over the pastthree years, the parties have vigorously pursued discovery on the score subjects delineated in Pretrial Order No. 2, at ¶ 10, and thereafter modified by subsequent rulings. Those core subjects include: the use of, source and identification of blood and blood derivatives; viral infectivity of blood and blood derivatives used by plaintiffs; laboratory tests and results regarding plaintiffs' HIV infection; general nature and treatment of hemophilia; knowledge concerning the risk of viral infectivity and HIV; warnings and

information regarding viral infectivity and HIV; plasma collection practices, including donor screening; and viral inactivation. The Settlement Agreement was signed as that core discovery was being concluded.

The plaintiffs' Document Depository contains over 1.5 million pages of documents which have been reviewed and coded by plaintiffs attorneys. The depository also contains over 850 deposition and trial transcripts which have been analyzed and digested by plaintiffs' counsel. In addition, the plaintiffs' Steering Committee has prepared for and taken or defended over no depositions. Records have been: inspected in the United States and. in Europe. Dozens of court hearings and pretrial conferences have been held and there have, been numerous rulings. on contested issues.

The docket is over 70 single-spaced pages, one indicator of the extent of this controversy. It also reveals that almost 100 discovery motions have been adjudicated. It is abundantly clear that the proceedings are sufficiently advanced to allow the parties to fairly evaluate the settlement.

(C) The complexity, Length, and Expense of Continued Litigation

This factor is to some extent addressed in (B) above. There are hundreds of filed lawsuits in state and federal courts which will be resolved through this settlement. Over 6,000 claims have been submitted to the Claims Administrator. If the filed lawsuits (putting aside the claims which have not yet become lawsuits) were each to be tried individually, it would be at an enormous cost to the state and federal judiciary and to all parties. This factor favors approval of the settlement.

(D) The Absence of Collusion and the Opinion of Competent Counsel

The court is fully confident that there has been no collusion between class counsel and the defendants. Class counsel are competent and have conducted this litigation vigorously for the past four years. The court has had many opportunities to observe counsel since 1993 when the MDL was formed. The virtually unanimous support of plaintiffs' counsel for the settlement is a factor favoring its approval.

(E) The Degree of Opposition to the Settlement

There has been very limited opposition to the settlement. This court has seriously considered and weighed each objection and has determined, after careful review, that the objections do not require rejection of the settlement.

At the time of the November 25, 1996, fairness hearing, 52 persons had criticized or objected to the settlement. Most of the objections were in the form of letters, as opposed to formal court filings. These can be grouped into seven categories:

(1) The first group considers $100,000.00 to be inadequate for the loss suffered. In truth, this court would find it difficult to determine that any particular amount is adequate to reimburse a spouse for the loss of a loved one, a child for the loss of a parent, or a parent for the loss of a child. But in our legal system, a monetary amount is frequently assigned to such claims for purposes of settlement. The court has considered many factors, including the results of the trials to date, defenses which might result in grants of summary judgment or defense verdicts, statutes of limitation, product identification problems, blood shield statutes, learned intermediary and

other defenses, The court also notes that over 90 percent of potential class members have elected to participate in the settlement. While the court appreciates the difficultly in assigning a value to claims such as those asserted here, and understands that a $100,000.00 payment is modest for the injuries suffered by the class members, it has determined, under all the circumstances and considering all the relevant factors, that objections based upon the amount of the monetary' payment are not a basis on which to disapprove the settlement.

(2) The second cluster of objections concerns subrogation and medical' liens. As stated in the class notice, the settlement is conditioned on resolving issues relating to reimbursement and subrogation claims that might possibly be asserted in which part or all' of the $100,000.00 payment could be claimed by various public or"' private sector healthcare reimbursers or insurers, including Medicare and Medicaid and issues relating to Class members' continuing eligibility for government programs such as Medicare or Medicaid payments. As stated in the notice, if these issues were not satisfactorily resolved, this settlement would not go forward. Since satisfaction of subrogation and medical liens is a condition precedent to the settlement becoming final, the parties have worked for many months to accomplish that end. These issues have been resolved to the satisfaction of the parties and the court finds that the resolution of these issues is fair and reasonable. Therefore, these objections are moot.

(3) The third cluster of objections relate to Von Willebrand disease. The signatory parties to the Settlement Agreement take the position that persons infected with Von Willebrand disease are not class members and that the settlement was not intended to apply to such persons. This question of whether the Von Willebrand claimants are class members will be resolved in the claims' resolution procedure

established pursuant to the Settlement Agreement and need not interfere with or delay approval of the settlement.

(4) The fourth set of objections relates to the concept of a "Claimant Group" pursuant to which claims are to be submitted on behalf of an entire Claimant Group (including spouses and children). It is the HIV infection of an eligible class member which results in the settlement payment. That settlement payment was offered in connection with the claim of each infected person, including his or her Claimant Group. The Claimant Group could either reject or accept the settlement. The court believes that a settlement whereby each member of the Claimant Group would be eligible for a separate $100,000.00 payment 'could not have been accomplished and thus, had plaintiffs insisted upon that approach, there would have been no settlement-payment at all. Rejecting the entire settlement would be unfair to the thousands of persons who seek to participate in the settlement, and the court rejects that alternative.

(5) The fifth group of objections was filed by a few persons who litigated and lost their cases prior to, execution of the Settlement Agreement. The defendants were steadfast in' their refusal to include these persons. Considering the benefits to the thousands of class members who wish to accept the settlement, the court will not reject the settlement because it does not include these persons.

(6) The sixth category of objectors does not actually oppose the present settlement but seeks instead to link its approval with Congressional passage of the Ricky Ray Hemophilia Relief Act whereby it is proposed that the federal government would pay $125,000.00 to each person infected with HIV through the use of factor concentrate. Whatever may be the merits of this proposal, it is not the province of the court to engage in efforts to promote passage of legislation in Congress. The court does not find this

objection to be a reason for disapproving the settlement.

(7) The seventh and final group of objections is presented by persons who are not citizens of the United States or permanent residents, and are therefore excluded from the class definition. (Since these persons are not class members, they are technically not objectors.) The parties are entitled to determine the parameters of the Settlement Agreement. The court does not consider it unreasonable to limit the settlement to United States citizens or permanent residents of the United States, its possessions and territories, and will not reject the settlement based on this objection.

There were separate objections filed by Attorney James Carney, and the court ordered additional submissions in response to these objections. The court has determined that those objections, which were based on Mr. Carney's mistaken belief that there was significant evidence of liability that was unknown to plaintiffs counsel, are without merit.

11. At the suggestion of plaintiffs' Steering Committee, the court appointed Robert K. Jenner as Guardian Ad Litem to represent class members who are minors or persons under disabilities. Mr. Jenner has represented plaintiffs in this litigation, has written a number of published articles about the legal questions presented and is well qualified to serve as Guardian. He has filed a thoughtful report, analyzing the liability issues and the difficulties of proof. He expresses the opinion that the settlement is fair and recommends it be approved.. The report of the Guardian Ad Litem is approved.

12. The settlement does not satisfy everyone. Few class settlements do. But this settlement ends years of litigation and provides redress for thousands of claimants. Subsequent to the November 25, 1996, fairness hearing, the

court has received numerous letters from class members supporting the settlement and earnestly requesting that it be approved as soon as possible. The court finds that class members have had an adequate opportunity to consider their individual circumstances, and to decide, in light of those circumstances, whether their interests are better served by participating in the class settlement or by opting out and pursuing individual claims. The court concludes that the Settlement Agreement among the parties is fair and reasonable for the Settlement. Class Members and is in accordance with Rule 23 of the Federal Rules of Civil Procedure. Accordingly, the settlement is approved.

13. The court orders the respective parties to.implement the Settlement Agreement according to its terms.

14. The court finds and hereby orders that all members of the settlement class who have not filed a timely notice of exclusion from the Settlement Class have for themselves and any party claiming through them released and forever discharged the fractionator defendants and their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the fractionators and distributors for the fractionators, as well as all directors, officers, employees, agents, insurers, and counsel for the foregoing, as well as their predecessors and successors. The release and covenant not to sue shall be for all claims arising out of all injury, disease or harm of any kind that the HIV infected person and members of such person's Claimant Group allegedly suffered as a result of use of Factor concentrate processed or distributed during the period from 1978 through 1985, as described in the Settlement Agreement, and such persons are forever barred from instituting, assigning, maintaining, collecting or prosecuting, claims against defendants.

15. The court finds and hereby orders that neither this Final order and Judgment nor the Settlement Agreement shall constitute or be interpreted to be a finding of the validity or invalidity of any claim or defense or any cause of action alleged or pleaded in the litigation.

16. The court finds and hereby orders that neither this Final Order and Judgment nor the Settlement Agreement, or any fact, conduct or act involving the settlement proceedings shall be offered or received in any proceeding as evidence, an admission, an inference or presumption, except as may be necessary to enforce or consummate the Settlement Agreement or to support a defense of release or other theory of claim preclusion, issue preclusion or similar defense.

17. The court finds and hereby orders that any person who has heretofore submitted a timely and valid request for exclusion from the Settlement Class will not be bound or affected by the Settlement Agreement or any release or discharge as provided in the Settlement Agreement or in this Final Order and Judgment. The schedule of those persons who have heretofore submitted timely and valid requests for exclusion from the Settlement Class will be filed under seal by the Claims Administrator.

18. The court intends that a separate court order shall be entered regarding attorney fees and reimbursement of expenses to attorneys and law firms representing the Settlement Class.. The court finds that the creation of the separate $40 million fund by defendants, from which plaintiffs' attorney fees are to be paid in amounts determined to be reasonable by the court, is fair and reasonable to the Class. The court reserves its decision as to the allocation of the fund. The separate order for attorney fees and expenses shall not affect or disturb this Final Order and Judgment or any of the findings or orders included in this Final Order and

Judgment.

19. Without affecting the finality of this Final Order and Judgment, the court reserves exclusive and continuing jurisdiction over these consolidated actions, the representative plaintiff, the Settlement Class Members, fractionator defendants, and each and all of their respective attorneys and law firms, for the purposes of supervising or determining the implementation, enforcement; construction and interpretation of the Settlement Agreement and all orders heretofore entered, for hearing and determining any motion or application by attorneys or law firms for an award of attorney fees and expenses, and for hearing and determining the final plan of allocation of the settlement.

20. The court finds and hereby orders that this Final Order and Judgment, and all the findings and orders included herein constitute a Final Order and Judgment, and the court determines that there is no just reason for delay and directs entry of the Final order and Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

DATED: May 8, 1997
ENTER: John F. Grady
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE
FACTOR VIII OR IX CONCENTRATE
BLOOD PRODUCTS LITIGATION

August 20, 1996

IMPORTANT LEGAL NOTICE

TO: ALL PERSONS WITH HEMOPHELIA WHO USED BLOOD CLOTTING FACTOR CONCENTRATES PROCESSED OR DISTRIBUTED FROM 1978 THROUGH 1985, AND WHO ARE (OR WERE) INFECTED WITH THE HIV AND THEIR ESTATES.

PLEASE READ THIS ENTIRE NOTICE CAREFULLY
YOUR LEGAL RIGHTS MAY BE AFFECTED

YOU MAY BE ENTITLED TO RECEIVE $100,000

NOTICE CONCERNING SETTLEMENT

A proposed settlement in a class action lawsuit involving blood clotting factor concentrates is now pending in federal court in Chicago, Illinois and may affect your rights. Please read this Notice carefully.

If you or your family member is a person with hemophilia who used Factor VIII or Factor IX (Factor Concentrates) processed or distributed by any of the Defendants during 1978 through 1985 and are (or were) infected with HIV, you may be eligible to receive $100,000 as a result of the proposed settlement. This settlement may be available to you if you or your family member have a lawsuit

pending in federal or state court, or even if you have not filed a lawsuit. This Notice describes your rights.

DESCRIPTION OF THE LITIGATION

The Honorable John F. Grady, a Judge of the United States District Court for the Northern District of Illinois, has pending before him numerous cases filed by per sons with hemophilia, their HIV infected spouses and children, and their estates. These lawsuits claim injury from the use of HIV-contaminated plasma-derived factor concentrates, specifically Factors VIII and IX.

The principal defendants in these suits are: ALPHA THERAPEUTIC CORPORATION, GREEN CROSS OF AMERICA CORPORATION and THE GREEN CROSS COR PORATION (collectively, "Alpha"), ARMOUR PHARMA CEUTICAL COMPANY, RHÔNE-POULENC RORER INC. (collectively, "Armour"), BAXTER HEALTHCARE COR PORATION4 and BAXTER INTERNATIONAL INC. (collectively, "Baxter"; which also refers to Travenol Laboratories, Inc., and Hyland Therapeutics, a division of Baxter
Healthcare Corporation), and BAYER CORPORATION and BAYER A.G. (collectively, "Bayer"; which also refers to Cutter Laboratories, Inc., Cutter Laboratories, a division of Miles, Inc., Miles Laboratories, Inc., Miles, Inc. and Miles Inc.). These Defendants are referred to in this Notice as the "Fractionators"

These lawsuits allege that the Fractionators are legally responsible for HIV infections caused by factor concentrates. The Fractionators have vigorously de fended these lawsuits and deny any liability.

The Judicial Panel on Multidistrict Litigation consolidated all federal cases before Judge Grady in 1993. Thereafter, Judge Grady appointed a Plaintiffs' Steering Committee to conduct that litigation, including discovery of common issues, on behalf of all of those plain tiffs. Judge

Grady has also attempted carefully to coordinate this consolidated federal litigation with the pretrial preparation of similar cases pending in various state courts.

On November 3, 1994, the District Court certified a litigation class action to resolve certain issues which it believed were common to all cases. However, on March 16, 1995, in response to a petition filed by the Fractionators, the United States Court of Appeals for the Seventh Circuit held that these issues were not properly certified as a litigation class action and directed that the class be decertified. On January 16, 1996, the District Court issued an Order decertifying the litigation class.

There has been substantial litigation before Judge Grady concerning the merits of the lawsuits which have been filed against the Fractionators including: examining, analyzing, and classifying over a million pages of the Fractionators' documents; briefing and arguing dozens of discovery and other pretrial motions; obtaining, analyzing and conducting hundreds A depositions, including depositions of the Fractionators' employees, and former employees: conducting extensive investigation, including medical and scientific research, into those common issues in this litigation impacting on any legal responsibility of the Fractionators: and retaining and presenting for deposition testimony medical and scientific experts.

On April 19, 1996, the Fractionators, without admit ting liability, and to limit the time, expense and risks of continued litigation, proposed a nationwide settlement of all claims of all members of the Settlement Class (which is described below). In August, 1996, following extensive negotiations among the Parties, a comprehensive settlement agreement was reached.

Judge Grady has certified a Settlement Class for purposes of considering whether to approve that settlements which is described in this Notice. If you are a member of the Settlement Class defined below, your rights are affected by this Proposed Settlement. You are eligible to file a claim to

participate in this Settlement even if the Fractionators have defenses to your claim, such as the statute of limitations, that might otherwise defeat your claim if you have filed or later file your own separate lawsuit. If you meet the definition of a Settlement Class member as described in the next section of this Notice ("Description of the Settlement Class"), no defenses that a Fractionator may have will play any role in determining whether or not you are eligible for this Settlement.

DESCRIPTION OF THE SETTLEMENT CLASS

The Settlement Class consists of all living persons who, as of August 13, 1996, are, and all deceased per sons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions and territories, and persons who are not, and deceased persons who were not, citizens or permanent residents of the United States but who are, or whose personal representatives are plaintiffs in law suits against one or more of the Fractionators that, as of January 1, 1996, were pending in any Court of the United States, and who are or were:

(a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also HIV infected (including those HIV infected per sons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates).

(c) all children of persons in sections (a) or (b) who as a

result of their relationship with per sons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent allegedly transmitted by such Factor Concentrates),

(d) all persons who are not or were not HIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a), (b), or (c), based upon the use of such Factor Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and support, fear of AIDS, hepatitis or any other infectious agents emotional distress, or claims for wrongful death under an applicable wrongful death statute,

(e) parents or guardians, on behalf of any mi nor or otherwise legally incompetent class members in sections (a), (b), (c) or (d), and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators, administratrices or personal representatives of any deceased class members in sections (a), (b), (c), (d) or (e).

Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or more of the Fractionators (including claims against one or more of the Fractionators and one or more non-Fractionators), as a result of which a payment or payments totaling $100,000 or more have already been made by one or more of the Fractionators, unless such per son has his or her own Direct Claim that has not previously been settled for $100,000 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has

previously settled in any amount with all four of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled in any amount with one or more of the Fractionators or who is a member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to final judgment in a trial court, unless such person has his or her own Direct Claim that has not gone to judgment. pro-vided, however, that a person against whom judgment has been entered for lack of prosecution of a claim shall not be excluded from the Settlement Class;

(e) any person who submits a timely written request to be excluded from the Settlement Class:

and

(f) any person who is a plaintiff in a case in which trial begins between the date of conditional certification and the date of final certification of the Settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

GENERAL ELIGIBILITY GUIDELINES

The following are merely general guidelines for eligibility and should not be read or understood to contradict the formal class definition outlined above which determines eligibility. To simplify matters, the basic guideline for eligibility is that each HIV infected persons generally eligible to receive $100,000 from the Settlement if he or she used Factor Concentrates processed or distributed by any of the Fractionators during the period 1978 through 1985. Also potentially eligible are persons who contracted HIV through

birth. or sexual relations with a spouse or eligible partner who took Factor Concentrates. However, as stated in the class definition, family members of such persons (those who have what the law calls derivative claims) are net separately eligible to receive $100,000, unless they them selves are infected with the HIV virus.

To illustrate, an HIV infected person with hemophilia who used Factor Concentrates processed by any of the Fractionators at any time during the period 1978 through 1985 is eligible to file a claim and, if approved, to receive $100,000 under the Settlement. If his wife is HIV infected as a result of sexual relations with him, she may also file a claim, and if approved, receive a separate $ 100.000. If they had a child who was also HIV positive through birth, this child would also be eligible to file a claim and, if approved, receive a separate $100,000 However, if the spouse or child is not HIV positive, they are part of the "Claimant Group" of the infected father or husband, and cannot file a separate claim for S 100,000.

A claim may be also filed on behalf of a person who is deceased. In the illustration above, if the father had died, the executor of his estate, or his personal representative, can assert his claim. The same $100,000 payment will be made, just as though the father or husband were alive and had filed his own claim form. The same is true for a deceased spouse, or deceased child, who was HIV positive.

It is not necessary that the deceased person have died of AIDS. Death can be from any cause, so long is the deceased person met the definition of an HIV infected Settlement Class member (paragraphs A, B, or C above).

You are a member of the Settlement Class if you meet the definition on page 2. regardless of whether you already have a lawsuit pending in federal or state court, or have never filed any lawsuit. However, if you have filed a lawsuit against one or more of the Fractionators that has gone to judgment in a trial Court, you are probably not a member of the Settlement Class. In addition, this settlement offer is not

available to people who choose to continue their lawsuits after the present Notice. These individuals must choose either to participate in the present Settlement or to opt out and continue with their present lawsuits.

The Fractionators have agreed that plaintiffs who previously settled claims with one, two or three (but not all four) of the Fractionators on or before April 19, 1996 for a total amount less than $100,000 are eligible to participate in the present Settlement up to a total of $ 100,000 (in other words, these individuals can receive the difference. if any, between the total of the previous settlement and $100,000) except that these claimants must be able to show that they used Factor Concenrate processed or distributed in the period 1978 through 1985 by at least one of the Fractionators with which they did not previously settle. For example, a Claimant who previously settled with Bayer and Armour for a total of $45,000 would be entitled to receive another $55,000, assuming proof of use of Factor Concentrate processed or distributed by either Baxter or Alpha in the period 1978 through 1985.

PROPOSED SEYFLEMENT AND PLAN OF DISTRIBUTION OF THE SETTLEMENT FUND

If you want to participate in this Settlement, you must file a Confidential Claim Form. This Form is included in the documents you received with this Notice. It says: "Confidential Claim Form and Exclusion Form" at the top. You must complete and return the form, postmarked on or before October 15, 1996 to the ad dress indicated. All information you supply 'will be kept strictly confidential, by Order of the Court, and will not be published or disseminated in any way. It will only be used, under strict and confidential supervision, to determine your eligibility to participate in the Settlement.

The Claim Form is designed so that you can complete it yourself. You do not need a lawyer.

Class Counsel have conducted discovery and investigation into the facts of the pending Lawsuits, have studied the general legal principles applicable to the claims in these Lawsuits, as well as the general legal principles applicable to claims that might be made by members of the Settlement Class who are not plaintiffs in the Lawsuits, and have concluded that a class settlement with the Fractionators in the amount and on the terms set forth in this Notice is fair and reasonable, and is in the best overall interest of the Settlement Class. However, it is also recognized that in those instances where individual lawsuits can be successfully litigated and you are willing, preferably with the advice of an attorney, to assume the risks, the uncertainties, and the delay involved in the outcome of those lawsuits, you might obtain a larger net amount of compensation from an individual lawsuit than the $100,000 that you could receive from the present Settlement. On the other hand, if you pursue your own individual lawsuits, you might recover a lesser net amount or nothing. This is an individual decision which you must make based on your own circumstances.

Under the Settlement terms, the Fractionators will pay $100,000 for each approved claim, in full and final settlement of the class members' claim. The Claimant (and members of that Claimant Group) will thereafter be barred from any further legal action against the Fractionators and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the Fractionators and distributors for the Fractionators, as well as all directors, officers, employees, agents, insurers, and counsel of the foregoing, as well as their predecessors and successors concerning Factor Concentrate processed or distributed during the period 1978 through 1985.

If you accept this settlement, the $100,000 payment will not have any attorneys fees or costs deducted from it. Any attorney who has represented you will have to make application to Judge Grady for any counsel fee and reimbursement of costs, and any such payments will come

from a separate fund which Judge Grady may approve, not from the $100,000 paid to you.

Acceptance of the Settlement will end all claims related to the use of Factor Concentrate that you have, or may have, against the Fractionators. You cannot accept the Settlement, and also file or continue your own lawsuit against Fractionators in either federal or state court. However, acceptance of the Settlement does not affect your right to pursue any claims you have against any person or organization other than the Fractionators (and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the Fractionators and distributors for the Fractionators, as well as all directors, officers, employees, agents, insurers, and counsel of the foregoing, as well as their predecessors and successors). For example, if you have filed a lawsuit against some party other than the Fractionators, acceptance of this Settlement will not bar you from continuing with that lawsuit, but it could, depending upon the state law applicable to your claim, reduce your total recovery in that lawsuit, especially if the Fractionators were found to be partially responsible for your injuries.

The Fractionators have made the settlement proposal with a desire to achieve substantially complete participation by affected members of the community. Therefore, under the Settlement Agreement, if too many persons decide not to participate, the Fractionators have the right (but are not obligated to) withdraw the Settlement offer. The Confidential Claim Form which has been sent to you includes, at the end, an "Exclusion Form.' The "Exclusion Form" must be completed and postmarked on or before October 15, 1996 if you do not desire to participate in the Settlement.

The Settlement is conditioned on resolving issues relating to reimbursement and subrogation claims that might possibly be asserted—in which part or all of the $100,000 payment could be claimed by various public or private sector healthcare reimbursers or insurers, including Medicare and

Medicaid—and issues relating to Class members' continuing eligibility for government programs such as Medicaid or Medicare payments. If these issues are not satisfactorily resolved, this Settlement will not go forward.

The Settlement is also subject to a decision by Judge Grady as to whether or not to approve the settlement as fair and reasonable to members of the Settlement Class. Judge Grady will make this decision after he conducts a final fairness hearing on the Settlement at the Chicago Federal Courthouse at 9:30 a.m. on November 25, 1996. This hearing, and your rights in connection with that hearing, are described below in the section titled "Final Fairness Hearing."

YOUR RIGHTS AND OPTIONS

If you are a member of the Settlement Class, you have the following rights and options.

A. Your Right to Participate in the Settlement.

You exercise this right by completing the enclosed Confidential Claim Form. You do not need a lawyer to file the enclosed Claim Form. The completed form, and all information contained in the form, will be treated as Confidential. Your Confidential Claim Form must be postmarked on or before October 15, 1996.

If you choose to participate, and you submit a timely Claim Form and your claim is approved, and if the overall settlement is approved by Judge Grady after the Fairness Hearing (and his Order is upheld and becomes final; in the event an appeal is taken), you will then be eligible to receive a $100,000 payment. Remember, only a single payment can be made to an HIV-infected per son. That will end all of your claims against the Fractionators concerning any alleged contamination of Factor Concentrate, and you will not have the right to pursue separate lawsuits against the Fractionators on such claims.

B. Your Right To "Opt Out" of the Settlement:

If you are a member of the Settlement Class, you have the right to exclude yourself ("opt out") from the Settlement Class. If you exclude yourself, you cannot participate in the Settlement described in this Notice, and you cannot receive any of the Settlement Funds, You can, however, pursue your own lawsuit with your own attorney.

To exclude yourself from the settlement class, you must complete the "Exclusion Form" which is enclosed. (it is part of the "Confidential Claim Form and Exclusion Form' package on p. 5.) Print and sign your name stating that you want to be excluded from the Settlement, and return the Exclusion postmarked on or be fore October 15, 1996.

The decision whether to exclude yourself from the settlement class is one that should be made with care, and after considering such factors as: (1) the strengths, merits, and damages potentially recoverable in an individual case, and the risks of losing the lawsuit: (2) your desire to pursue or not pursue individual litigation against the Fractionators. and (3) the value to you of receiving from the Settlement Fund a definite, fixed amount at an earlier time, as opposed to your possible recovery in an individual lawsuit of a different amount in the future (which could be higher, lower or none at all). Each individual may have a greater or lesser chance to succeed in an individual lawsuit, depending upon the specific facts of each case, the applicable state law, including the applicable the statute of limitations, and other defenses available to the Fractionators.

If you decide to opt out of the settlement class to pursue your own individual litigation, you (and your individual attorney, if you have one) MUST sign a completed Exclusion Form and return it postmarked on or before October 15, 1996, even if you already have a lawsuit now pending in federal or state court against these Fractionators over the same subject matter.

C. Your Right to Support or Oppose the Settlement

If you remain a member of the Settlement Class (in other words, you do not request to be excluded) you also have the right to support or oppose the Settlement at the Court Fairness Hearing. This right is described in more detail in the section of this Notice concerning the Court Fairness Hearing.

D. Failure to File the Confidential Claim and Exclusion Form: If you are a member of the Settlement Class described in this Notice, and you "do nothing"—in other words, do not choose either to participate in the Settlement or exclude yourself ("opt out") from the Settlement Class—you will be barred from any further right to recover from the Fractionators for a claim concerning contamination of Factor Concentrates, even if you already have a lawsuit pending. You will not receive any money from the Settlement Fund, and you will also lose the right to pursue an individual lawsuit against these Fractionators.

FINAL FAIRNESS HEARJNG

Judge Grady will conduct a Fairness Hearing to deter mine whether the proposed settlement and plan of distribution is fair and reasonable for members of the Settlement Class. This hearing will be held on November 25, 1996 at the United States District Court, Northern District of Illinois. Eastern Division, Courtroom 2525, 219 South Dearborn Street, 9:30 a.m, Chicago local time. The Hearing may be adjourned without additional notice.

If you exclude yourself from the Settlement Class, this hearing does not concern you and you do not have the right to participate in the Hearing. If you remain a member of the Settlement Class, you have the right, if you choose. to file papers supporting or objecting to the Settlement. and to appear personally or through your attorney at this Hearing to speak in favor of, or in opposition to, the fairness and reasonableness of the proposed Settlement. If you approve of the Settlement, you do not need to attend the hearing and do

not need to send papers stating your approval.

If you remain a member of the Settlement Class, you do not need to be represented by an attorney to support or oppose the Settlement. If you desire to write in favor of or in opposition to the Settlement, you should state each reason you support or oppose the Settlement. Your statement must be postmarked on or before October 15, 1996. You must send copies of your statement to each of the following: (1) Clerk of Court of the United States District Court for the Northern district of Illinois, Eastern Division, MDL 986, 219 South Dearborn Street. Chicago. Illinois 60604: (2) David S. Shrager, Two Commerce Square, 2001 Market St., Philadelphia, Pa. 19103: (3) Dianne M. Nast, 36 E. King St., Suite 301, Lancaster, Pa.. 17602: and (4) Sara J. Gourley, Sidley & Austin, One First National Plaza, Chicago, Illinois 60603. If you desire to appear and speak at the Fairness Hearing, so indicate in your statement. You do not have to appear at the hearing to write in favor of or to oppose the Settlement.

ATTORNEYS FEES AND COSTS

Attorneys fees and costs will not be deducted from the S 100,000 Settlement amount sent to each eligible claimant who participates in the Settlement, except that if you consult an attorney solely to seek advice on the question of whether to participate in the Settlement, you will be personally responsible for paying that attorney's reasonable charges, if any, for such ad vice. All other payments will be made from the Cost and Fee Fund established by the Fractionators. The maximum amount of this Fund will be $40 million, plus accrued interest.

If the Settlement is approved by Judge Grady, all requests for attorneys fees and reimbursement of costs—both for members of the Plaintiffs' Steering Committee, and for individual lawyers representing members of the Settlement Class—will require approval by Judge Grady before any such payments of fees will be made.

No fee payments approved by Judge Grady will reduce the settlement payment to Settlement Class members. Applications for costs and fees must be filed of record on September 23, 1996 with the Clerk of Court, United States District Court, Northern District of Illinois, Eastern Division, MDL 986,219 South Dearborn Street, Chicago, Illinois, 60604, and will be available for your inspection there. If you object to any fee request, you must file your objection with the Clerk of Court at the above address and send a copy to the individuals listed in the "Additional Information" Section below. Any such objections must be postmarked on or before October 15, 1996.

The Court will also be requested to authorize payment from the Cost and Fee Fund for claims administration and for the costs of notice and similar costs. None of these costs will affect the Settlement amount to be paid to eligible claimants.

EXAMINATION OF PAPERS AND INQUIRIES

The Settlement Agreement has been filed and is available for inspection by any person during normal business hours at the office of the Clerk of the United States District Court, Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois 60604. The Clerk's Office also has the pleadings, previous orders entered by the Court, and other papers.

Briefs and other papers of the settling parties in support of the Settlement will be filed with the Clerk of Court on or before September 16, 1996. Plaintiffs' Counsel's request for attorney fees and reimbursement of costs and expenses will be filed with the Clerk of Court on or before September 23, 1996. All such documents will be available at the office of the Clerk of Court for your inspection.

ADDITIONAL INFORMATION

ALL QUESTIONS RELATING TO THIS NOTICE MAY BE DIRECTED TO THE FOLLOWING

PLAINTIFFS' COUNSEL

David S. Shrager, Esquire
Lead Class Counsel
SHRAGER, MCDAID, LOFTUS, FLUM & SPIVEY
Two Commerce Square
2001 Market Street
Philadelphia, Pennsylvania 19103
(215) 568-7495 (Fax)

or

Dianne M. Nast, Esquire
Lead Class Counsel
RODA & NAST, P.C.
Suite 301
36 East King Street
Lancaster, Pennsylvania 11602
(717) 397-3669 (Fax)

You may call 1-800-836-9376, if you have questions. If you know of someone who wants to receive this Notice, please send his or her name to one of the attorneys listed above.

PLEASE DO NOT WRITE OR CALL THE COURT OR THE CLERK'S OFFICE FOR INFORMATION

Dated: August 20, 1996- By:

/s/

Eastern Division
219 South Dearborn Street
Chicago, Illinois 60604
Clerk of the Court
United States District Court
Northern District of Illinois

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE
FACTOR VIII OR IX CONCENTRATE BLOOD
PRODUCTS LITIGATION

SUSAND WALKER, Administratix of the Estate
Of Steven Walker, Deceased,
Plaintiff,

v.

BAYER CORPORATION, et al,
Defendants.

August 14, 1996

PRETRIAL ORDER NO. 32

(Certification of Settlement Class, Preliminary Approval of Settlement Agreement, Authorization to Disseminate Notice, and Dates for Memoranda and Applications)

Upon consideration of the Motion for Certification of Settlement Class, for Preliminary Approval of the Factor Concentrate Litigation Settlement Agreement dated August 13, 1996 "settlement Agreement") and for Authorization to Disseminate Notice to the Settlement Class, and the Memorandum in Support thereof, and after consideration of the entice record in these consolidated proceedings, it is hereby ORDERED as follows:

1. The Settlement Class is defined as all living persons who as of August 13, 1996, are, and all deceased persons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions

and territories, and persons who are not, and deceased persons who were not, citizens or permanent residents of the United States but who are, or whose personal representatives are plaintiffs in lawsuits against one or more of the Fractionators that, as of January 1, 1996, were pending in any Court of the United States, and who are or were:

(a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(c) all children of persons in sections (a) or (b) who as a result of their relationship with persons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent allegedly transmitted by such Factor Concentrates),

(6) all persons who are not or were not MIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a) , (b) , or (c) , based upon the use of such Factor Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and

support, fear of AIDS, hepatitis or any other infectious agents, emotional distress, or claims for wrongful death under an applicable wrongful death statute,

(e) parents or guardians, on behalf of any minor or otherwise legally incompetent class members in sections (a) (b), (c) or (d), and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators administratrices o.r personal representatives of any deceased class members in sections (a) , (b) , (c), (d) or (e)

Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or -tore of the Fractionators (including claims against one or more of the Fractionators and one or more non-Fractionators), as a result of which a payment or payments totaling $100,000 or more have already been made by one or more of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled for $100,000 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has previously settled in any amount with all four of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled +n any amount with one or more of the Fractionators or who is a

member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to judgment in a trial Court, unless such person has his or her own Direct Claim that has not-gone to judgment, provided, however, that a person against whom judgment has been entered for lack of prosecution of a claim shall not be excluded from the Settlement Class;

(e) any person who submits a timely written request to be excluded from the Settlement class; and

(f) any person who is a plaintiff in a case in which trial begins between the date of conditional certification and the date of final certification of the Settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

2. David S. Shrager and Dianne M. Nast are hereby appointed Lead Class Counsel for the Settlement Class, and are authorized to carry out the duties of class counsel in association with members of the Court—appointed Steering Committee who shall serve as Class Counsel.

3. The Settlement Agreement (Exhibit A) is preliminarily approved and is sufficiently fair, reasonable and adequate to permit Notice to be disseminated to members of the Settlement Class.

4. The Notice ("Important Legal Notice") and the Summary Notice which have been submitted to the Court

(Exhibits B and C), comply with F.R.Civ.P. 23 and are hereby approved. The Notice and Summary Notice in substantially the forms set out in Exhibits B and C shall be disseminated to members of the Settlement Class. The parties are directed promptly to submit to the Court for approval the Confidential Claim Form and Exclusion Form that the parties are now preparing in accordance with a letter agreement that has been made part of the record in this case.

5. The Notice Plan (Exhibit D) submitted by Plaintiff is approved, and all parties are directed to implement and carry out that plan within the timetable set forth therein.

6. On or before August 16, 1996, each Defendant, other than the National Hemophilia Foundation, shall provide to Lead Class Counsel the names and addresses of all potential Settlement Class members, to the extent such names and addresses are known to any Defendant or can be identified through reasonable effort. Lead Class Counsel shall maintain all such names and addresses under strict confidentiality, limited to those persons necessary to implement this Order.

7. On or before August 16, 1996, all Defendants shall provide to Lead Class Counsel the names and addresses of each attorney or other person, reasonably known to them, who purports to represent a Settlement Class member.

8. On or about August 20. 1996, Lead Class Counsel shall mail the Notice and the Confidential Claim Form and Exclusion Form, by first class mail, to all Settlement Class members who can be identified through reasonable effort, and to attorneys and others identified pursuant to Paragraphs 6 and 7 herein.

9. On or about August 20, 1996, Defendant The National Hemophilia Foundation, shall mail the Notice, and the Confidential Claim Form and Exclusion Form, by first

class mail (multiple copies of postage prepaid Notices to be provided by Lead Class Counsel) to each individual and organization on its mailing list.

10. On or about August 20, 1996, Lead Class Counsel will provide multiple copies of first class, postage prepaid Notices, and Confidential Claim Forms and Exclusion Forms, to each United States local Chapter of the National Hemophilia Foundation identified by it pursuant to paragraph 9 herein. Lead Class Counsel and the National Hemophilia Foundation will request each such local Chapter to mail these documents to its members.

11. On or about August 20, 1996, Lead Class Counsel will provide multiple copies of first class postage prepaid Notices Confidential. Claim Forms and Exclusion Forms, to hemophilia membership groups which can be reasonably identified, including membership groups such as the Committee of Ten Thousand, The Hemophilia Foundation, The Hemophilia Association of Southern California, The Hemophilia Association of New Jersey, The Hemophilia/HIV Peer Association, all United States based centers and facilities and organizations listed in the current NHF Directory of Centers and Facilities, and the American Red Cross. Lead Class Counsel will request each such organization to mail these documents to all persons in the hemophilia community for whom addresses are available.

12. No organization, including The National Hemophilia Foundation, its local chapters, or other organization or association shall incur legal liability to Settlement Class members related to the mailing of notice.

13. On or about August 30, September 3, and September 6, 1996, Lead Class Counsel will cause the Summary Notice to be published in all national editions of USA Today.

14. On or about August 30. 1996, Lead Class Counsel will provide informational releases to radio, television and print media in the United States by utilizing the PR Newswire or similar services.

15. On or about August 30, 1996, Lead Class Counsel shall cause the Summary Notice to be posted, to the extent possible, on various computer networks that are part of the Internet, including any appropriate bulletin board or other location which can reasonably be identified. Posting on such computer networks shall be done on a weekly basis, to the extent the computer networks willallow weekly posting, through and including the week of September 16. 1996.

16. The costs of the Notice shall be paid from the separate Cost and Fee fund provided for in Section L of the Settlement Agreement.

17. All Memoranda in Support of Final Approval of the Settlement shall be filed on or before September 16, 1996.

18. The Confidential Claim Forms, requests for exclusion from the Settlement Class, any objections to the proposed settlement or to any application for attorneys fees and cost disbursements, must be postmarked on or before October 15. 1996.

19. A hearing to consider final approval of the Settlement Agreement shall be held on November 25. 1996 at 9:30 a.m., Chicago local time, in Courtroom 2525, United States District Court, Northern District of Illinois, Eastern Division, 219 South Qearborn Street, Chicago, Illinois 60604. This hearing may be adjourned without further notice.

20. The Court, in its capacity as fiduciary for all settlement class members, possesses and intends to exercise its authority, to approve and supervise all payments of

attorneys' fees and reimbursement of cost disbursements for all counsel representing members of the Settlement Class, including the members of Plaintiffs' Steering Committee and all individual pounsel for any Settlement Class member. The Court intends to authorize such payments and reimbursements through the mechanism of the Cost and Fee Fufld provided for in the Settlement Agreement, to which all applications for payment and reimbursement of expenses shall be made. All applications for fees and reimbursement of expenses by any attorney representing or purporting to represent any member of the Settlement Class, shall be filed with the Clerk of the Court by September 23, 1996. The Court retains its authority to modify contingent fee contracts entered into with Settlement Class members as necessary, to scrutinize carefully services performed on behalf of Settlement Class members, to ensure that compensation is reasonably related to services performed to members of the Settlement Class.

21. Lead Class Counsel and Defendants' Counsel are directed to cooperate in serving copies of this Order upon every counsel in
every pending federal and state lawsuit of which they are aware in which it appears that plaintiff is or may be a member of the Settlement Class as defined in Paragraph 1 of this order.

Dated: August 14,____1996

ENTER:

John F. Grady, United States District Judge

Rule 23. Class Actions

(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to

the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to

the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions.

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, nd that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 , and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise.

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals.

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Notes

Rule 23.1. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the

plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Notes

Rule 23.2. Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d) , and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e) .

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U.S.
FILED
MAR 23 2001
CLERK

No. 00-1331

IN THE
Supreme Court of the United States

EDWARD GADSON, *et al.*,

Petitioners,

v.

SUSAN WALKER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether petitioners may relitigate the propriety of a 1997 final judgment that approved a nationwide class settlement by asserting, without evidentiary support, that they (a) failed to receive actual notice of the proposed class and settlement, (b) could not be bound because they were "future" members of the class, and (c) received inadequate representation?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

The parent company of Rhône-Poulenc Rorer Inc. is Aventis S.A. All subsidiaries of Rhône-Poulenc Rorer Inc. are wholly owned.

The parent company of Armour Pharmaceutical Company is Rhône-Poulenc Rorer Inc. All subsidiaries of Armour are wholly owned.

The parent company of Bayer Corporation is Bayer A.G. Onyx Pharmaceuticals, Inc., Millennium Pharmaceuticals, Inc., and Myriad Genetics, Inc. are non-wholly-owned subsidiaries of Bayer Corporation.

Baxter Healthcare Corporation's parent company is Baxter International, Inc. Baxter owns stock in certain publicly-traded companies and is filing this information under seal with the Clerk of the Court.

The parent company of Alpha Therapeutic Corporation is Green Cross International, Inc. Business Travel Specialists, Inc., G.C. Pharmaceutical (Singapore) Ptc Ltd., Grifols UK Ltd., and Grifols Italia SpA are non-wholly-owned subsidiaries of Alpha Therapeutic Corporation.

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IN THE

Supreme Court of the United States

No. 00-1331

EDWARD GADSON, *et al.*,

Petitioners,

v.

SUSAN WALKER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

The petition arises from the latest in a series of collateral attacks upon the 1997 final judgment that approved the factor concentrate class settlement. Pursuant to that judgment, respondent fractionators[1] have paid more than $620 million to hemophiliacs who claim that they contracted HIV from the plasma therapies used to treat their bleeding disorder and to the families of those hemophiliacs. The final judgment extinguished as to fractionators the tort claims of all class members who failed to opt out of the class and settlement. Pet. App. 42a ¶ 14.

[1] "Fractionation" is the process by which plasma is separated into its different components. Fractionators are Armour Pharmaceutical Co., Bayer Corp., Baxter Healthcare Corp., and Alpha Therapeutic Corp. Also named as a defendant is Rhône-Poulenc Rorer Inc., the indirect parent corporation of Armour.

Petitioners are class members who did not timely opt out of the class and settlement, but nevertheless persisted in suing fractionators in state court. The district court enjoined petitioners' state court lawsuits pursuant to the All Writs Act, 28 U.S.C. § 1651(a), Pet. App. 7a-8a, and the United States Court of Appeals for the Seventh Circuit affirmed. Pet. App. 1a-3a. Petitioners now have asked this Court to grant certiorari to determine whether their due process rights are being violated.

Petitioners' arguments are not supported by either the evidentiary record or the law. Petitioners claim that they did not receive actual notice of the proposed class and settlement. However, one of the petitioners actually filed a timely claim for payment under the settlement, and the evidence strongly suggests that the other petitioners were aware of the proposed class and settlement. *See infra* at 8-9. The record also refutes petitioners' claim that they were "future" class members. *See infra* at 9-10. Petitioners fail to support their claim that the class was not represented adequately. *See infra* at 11-12.

Petitioners further contend that, as a matter of due process, they are entitled to relitigate the question of whether the class certified in 1997 met all the requirements of Rule 23. No court has abrogated the finality rule in this way. This Court has already declined to review this specific contention in petitions arising from two prior collateral attacks on the factor concentrate judgment. *See In re Factor VIII or IX Concentrate Blood Prod. Litig., Appeals of Spece, Ibañez, and Mull & Mull* and *In re Mull & Mull*, 159 F.3d 1016 (7th Cir. 1998) (Pet. App. 25a-32a), *cert. denied*, 526 U.S. 1081 (1999); *In re Factor VIII or IX Concentrate Blood Prod. Litig.*, 202 F.3d 273 (7th Cir. 1999) (Pet. App. 4a-6a), *cert. denied*, 529 U.S. 1033 (2000).

Finally, petitioners assert that the final judgment cannot bind class members who did not take the affirmative step of

opting into the class and settlement. Rule 23 was amended in 1966 to do away with the "spurious" class action rule advocated by petitioners. *See* Fed. R. Civ. P. 23 adv. comm. notes regarding 1966 amendment. No court has held that due process requires a return to the old procedure.

In short, there is nothing about the decision of the court of appeals that is remotely worthy of review. Petitioners' arguments are not supported by the evidentiary record. The decisions below do not conflict with the precedents of this or any other court. Moreover, the decisions below are factbound and correct. Accordingly, certiorari should be denied.

COUNTER STATEMENT OF THE CASE

1. Hemophilia is an incurable bleeding disorder caused by deficiencies of certain clotting factors in the blood. It is treated by administering the missing clotting factors to the patient. In the late 1960s and early 1970s, fractionators developed freeze-dried clotting factor concentrates derived from human plasma that dramatically improved the quality of life and life expectancy of persons with hemophilia.[2] However, the advent of the disease now known as AIDS had a tragic impact on persons with hemophilia. Before anyone knew that AIDS was transmissible by blood and plasma products, thousands of hemophiliacs were infected with the retrovirus now called HIV and known to be the cause of AIDS.[3]

2. Lawsuits were filed alleging almost 800 cases of HIV transmission through factor concentrates. In late 1993, all

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[2] Leon W. Hoyer, M.D., *Medical Progress: Hemophilia A*, 330 New Eng. J. Med. 38 (1994).

[3] Barbara L. Kroner, et al., *HIV-1 Infection Incidence Among Persons With Hemophilia in the United States and Western Europe 1978-1990*, 7 J. of Acquired Immune Deficiency Syndrome 279 (1994).

pending federal factor concentrate cases were consolidated in the Northern District of Illinois before Judge John F. Grady. *In re Factor VIII or IX Concentrate Blood Prod. Litig. (MDL-986)*, 853 F. Supp. 454, 456 (J.P.M.L. 1993). In 1994, the district court certified a nationwide "issue" class for the purpose of determining in a single trial whether fractionators were "guilty of ordinary negligence." *Wadleigh* v. *Rhône-Poulenc Rorer Inc.*, 157 F.R.D. 410, 426 (N.D. Ill. 1994). The court of appeals subsequently issued a writ of mandamus ordering the district court to decertify the class. *Matter of Rhône-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995). This Court denied certiorari, 516 U.S. 867 (1995), and the class was decertified.

3. Fractionators and the Plaintiffs' Steering Committee subsequently negotiated a class settlement in which fractionators agreed, *inter alia*, to pay $100,000 for each approved claim. Pet. App. 52a-67a.[4] On August 14, 1996, the district court conditionally certified a Rule 23(b)(3) settlement class in the case of *Walker* v. *Bayer Corp.*, No. 96-C-5024 (N.D. Ill. 1996) and authorized issuance of class notice. FA271.[5] In accordance with Rule 23(c)(2), the notice expressly advised class members that, in order to preserve the right to pursue individual litigation against fractionators, they had to opt out of the class by October 15, 1996. Pet. App. 63a.

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[4] In addition, fractionators paid more than $30 million to resolve federal and state Medicare and Medicaid claims as well as the claims of most private health insurers, so that claimants would receive the settlement payments free and clear of most outstanding claims. Pet. App. 46a ¶ 10(E)(2); 50a; 61a-62a. Fractionators also established a separate $40 million fund as the exclusive source from which the district court would later award all costs and attorneys' fees. Pet. App. 50a ¶ 18.

[5] Fractionators have lodged with the Clerk of the Court copies of fractionators' appendix to their brief in the court of appeals ("FA").

Individual notice was provided to all identified members of the class. FA275 ¶¶ 6-8. The National Hemophilia Foundation mailed the notice to each individual and organization on its mailing list. FA275 ¶ 9. Additional copies of the notice were provided to other hemophilia membership groups. FA276 ¶¶ 10-11. Summary notice was published in a national newspaper on three dates. FA276-77 ¶ 13. *See also* FA280. News releases and Internet postings provided additional notice of the settlement. FA277 ¶¶ 14-15. In addition, the class settlement drew substantial media attention. FA281-324.

The district court specifically found that the plan of notice "fully and accurately informed the [s]ettlement [c]lass [m]embers of all relevant and material elements of the proposed [s]ettlement [a]greement and afforded them an adequate time to decide whether to opt out of the settlement." Pet. App. 39a ¶¶ 5-6. The district court further found that the notice "constituted the best notice practicable under the circumstances, that the notice constituted valid, due and sufficient notice to all [s]ettlement [c]lass [m]embers, and that the notice given was in such manner as directed by the court and in full accordance with Rule 23 of the Federal Rules of Civil Procedure." *Id.* ¶ 7.

4. After two fairness hearings, the district court entered final judgment on May 8, 1997, certifying the class and finally approving the settlement. Pet. App. 35a-51a. The final *Walker* judgment expressly barred claims against fractionators by class members who had not filed timely opt-outs. *Id.* at 49a ¶ 14. In a subsequent order, the district court held that class members could seek to opt out on an untimely basis if they could establish extraordinary circumstances supporting their request. *Id.* at 33a-34a. Two appeals of the final factor concentrate judgment were dismissed voluntarily pursuant to settlements. *Dowling* v. *Alpha Therapeutic Corp.*, No. 97-2410 (7th Cir., appeal dismissed July 16, 1997); *Otis*

v. *Bayer Corp.*, No. 97-2556 (7th Cir., appeal dismissed July 24, 1997). Fractionators began the process of paying class members.

5. Certain attorneys then collaterally attacked the judgment in an attempt to obtain fees in addition to those provided under the settlement agreement. Those attorneys argued, among other things, that the judgment violated due process and conflicted with this Court's decision in *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997). The district court rejected the attorneys' collateral attack upon its judgment, FA350-52, and the court of appeals affirmed. *In re Factor VIII or IX Concentrate Blood Prods. Litig., Appeals of Spece, Ibañez and Mull & Mull* and *In re Mull & Mull ("Spece & Mull")*, 159 F.3d 1016 (7th Cir. 1998) (Pet. App. 25a-32a). This Court denied certiorari. 526 U.S 1081 (1999).

6. A second collateral attack was then filed by certain class members who initially had filed timely claim forms but then filed or sought to reactivate their state court lawsuits against fractionators. The district court denied the class members' Rule 60(b) motions and granted fractionators' motion to enjoin the state court lawsuits. Pet. App. 11a-24a. Once again, the district court rejected arguments that its final judgment was void under *Amchem*, 521 U.S. 591, and failed to comply with the requirements of Rule 23. App. 11a-12a, 20a, 22a. The court of appeals affirmed in an unpublished order. *In re Factor VIII or IX Concentrate Blood Prods. Litig., Appeal of Tallakson*, 202 F.3d 273 (7th Cir. 1999) (Pet. App. 4a-6a). This Court again denied certiorari. 529 U.S. 1033 (2000).

7. The present petitioners nevertheless pursued individual lawsuits against fractionators in state court.[6] On

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[6] Two other class members represented by the same counsel also pursued individual litigation against fractionators. Those class members

June 1, 1999, fractionators moved to enjoin those lawsuits. FA374. Petitioners opposed the motion but provided no evidence to support their claim that they failed to receive actual notice of the class settlement. *See* Pet. App. 2a-3a.

Before the district court ruled upon the pending injunction motion, petitioners filed a preemptive petition for writ of mandamus in the court of appeals. After that court denied mandamus, FA389-90, the district court enjoined petitioners from pursuing individual state court lawsuits against fractionators. Pet. App. 7a-8a. The district court explicitly relied upon its previous orders that (1) set forth the procedures for opting out of the class on an untimely basis; (2) enjoined similarly situated class members from pursuing individual state court lawsuits; and (3) denied similarly situated class members' motions for relief from the district court's final order and judgment approving the class settlement. *Id.*

8. The court of appeals affirmed in an unpublished order that relied on its opinions in the prior collateral attacks. Pet. App. 2a-3a. The court observed that one of the present petitioners is "identically situated to the claimants whose appeals we rejected in our October 7, 1999, order. The other four claim not to have received notice of the proposed settlement, but the district court with ample basis rejected the claim as factually unfounded." *Id.* The court of appeals held that the class settlement "was not void and could not be collaterally attacked," emphasizing the court's prior holding that "[a]fter a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge." *In re Factor*

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were subject to the proceedings in the district court and court of appeals, but have not joined the present petition.

VIII or IX Concentrate Blood Prods. Litig., Appeal of Gadson, 234 F.3d 1273 (7th Cir. 2000) (citing 159 F.3d at 1019) (Pet. App. 2a). Petitioners then sought review by this Court.

REASONS THE PETITION SHOULD BE DENIED

Fractionators entered the costly factor concentrate class settlement to reduce to a small and defined group the persons who could pursue individual tort litigation against fractionators. Petitioners did not opt out of the class on a timely basis. Accordingly, their claims against fractionators were extinguished by the final judgment that approved the class and settlement.

Petitioners' challenge to that judgment is based upon unsupported statements by petitioners' counsel. In many instances, those assertions are contradicted by the evidence before the district court. The district court and court of appeals concluded that petitioners had not established a factual predicate for their due process arguments. Those determinations are correct, factbound, and do not conflict with the precedents of this or any other court.

Indeed, petitioners' legal arguments run contrary to decades of due process, finality, and class certification law. Even if this Court were inclined to revisit those issues, the present case would not provide an appropriate vehicle. Accordingly, the petition should be denied.

I. Petitioners first complain that it is improper to bind class members who did not receive actual notice of the settlement. Pet. 7-10. This issue is not presented on the record. One petitioner, Victoria Governali, actually filed four timely claim forms on behalf of her minor nephew, Robert P. Burlingame, for the deaths of his parents, Robert M. and

Frances Burlingame. FA1-104.[7] The other petitioners – Edward Gadson, Lisa Simonelli, and Khemwatie Ramnauth (on behalf of her minor son Richard Katwaru) – presented no evidence other than their counsel's unsupported argument that they did not have actual notice of the settlement. Indeed, the record before the Court supports the inference that these petitioners were aware of the proposed class and settlement.[8] The Seventh Circuit, noting that "the district court with ample basis rejected the claim [of lack of notice] as factually unfounded," unremarkably held that the district court did not abuse its discretion in concluding that these petitioners were not entitled to back out of the settlement. Pet. App. 2a-3a.

II. Petitioners assert, without evidentiary support, that they cannot be bound by the judgment because they are "future class members," as that term is used in *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997). However, the record establishes that all of the HIV infections at issue occurred long before the deadline for opting out of the *Walker* class. FA394-95 ¶¶ 14-16; FA417 ¶¶ 8-11; FA425 ¶¶ 14-16; FA437 ¶¶ 10-13; FA444 ¶¶ 9-11; FA452 ¶¶ 9-12. Indeed, all

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[7] Governali represented in those claim forms that she had legal authority to participate in the settlement on her nephew's behalf. FA1, FA4, FA39, FA44, FA56, FA83. She later attempted to repudiate the claim forms by asserting, without evidentiary support, that she was not appointed guardian and estate representative until a later date. Governali's disingenuous argument does not change the fact that she had actual notice of the proposed class and settlement and that no one filed a timely opt-out form for her nephew.

[8] The record establishes that: (1) claims were filed on behalf of both of Gadson's HIV-positive hemophiliac uncles, with whom he had a close relationship, FA144, FA193, FA213-18; (2) Simonelli's former husband, through whom she claims to have been infected, filed a claim form and was paid under the settlement, FA444-45, ¶¶ 9, 17-18; and (3) Ramnauth, acting on behalf of her son, asked for and was sent a claim form which was never returned, FA266. The record also contains the detailed plan of class notice. *See* FA276-77. Petitioners have never challenged the constitutional adequacy of that plan.

but one petitioner admitted that they were aware of their HIV status long before notice issued. FA1, FA144, FA193, FA265.

The remaining petitioner, Edward Gadson, is not a "future" class member because, as both of the lower courts recognized, he had long possessed information that would put any reasonable person on notice that he likely was HIV positive. Gadson's decision not to be tested for HIV until after the opt-out date, when doctors not only diagnosed him with HIV but also with "full-blown AIDS," FA213, FA219-23, was one wholly within his own control and does not entitle him to avoid the factor concentrate judgment. Petitioner could have preserved his option of later filing an individual lawsuit, while still avoiding finding out about his HIV status, simply by opting out of the class timely.

On this record, there is nothing extraordinary about the court of appeals' decision that the district court acted within its discretion in concluding that the petitioners are bound by the final judgment.

III. Petitioners also argue that the final judgment cannot bind them because the class was inadequately represented. Pet. 11-12. However, in approving the class and settlement, the district court specifically found that the factor concentrate litigation had been contested vigorously, that class members faced significant problems in proving their claims, and that the class settlement was widely supported by class members. Pet. App. 42a-49a. Petitioners' conclusory assertion that the settlement was not large enough, Pet. 24, is inherently factbound and does not warrant this Court's review.

IV. Petitioners next argue that class members are entitled, as a matter of due process, to relitigate on collateral attack whether a finally-certified class conforms to each of the requirements of Rule 23(a) and (b). More specifically, petitioners complain that, because the final factor concentrate

judgment was not reviewed on direct appeal, "[t]here has never been an examination as to whether the settlement-only class was properly or improperly certified under subdivisions (a) and (b) of Rule 23." *See* Pet. 3.

However, in certifying the class, the district court concluded that the class met the requirements of Rule 23. Pet. App. 48a-49a. In rejecting the collateral attacks on the factor concentrate class settlement, the district court reiterated that the class complied with Rule 23. FA350-52; Pet. App. 13a, 20a, 7a. The Seventh Circuit has consistently ruled that the district court had jurisdiction to certify the class and that its judgment may not be second-guessed on collateral attack. Pet. App. 28a-29a, 6a, 3a.[9] This Court has already twice declined to review the issue. 526 U.S. 1081; 529 U.S. 1033.

There simply is no authority for the proposition that class members who received constitutionally adequate notice and representation may perpetually dispute whether a finally-certified class met the requirements of Rule 23. Rather, as the Seventh Circuit has held repeatedly in this litigation, allowing such far-reaching collateral attacks would violate the principle of finality. Pet. App. 28a-29a, 6a, 3a. These holdings are wholly consistent with this Court's judgment in *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997), which addressed issues of class representation and superiority on a direct appeal.[10]

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[9] The court has questioned the structure of the settlement, but concluded that such musings after entry of a final judgment do not provide a basis for a collateral attack. Pet. App. 27a-28a, 3a.

[10] Petitioners claim, erroneously, that the lower courts' decisions directly contradict Seventh Circuit case law, citing *Tice* v. *American Airlines*, 162 F.3d 966 (7th Cir. 1998). In *Tice*, pilots challenged American Airlines' policy that flight officer positions could not be filled by a pilot who had reached retirement age. American had successfully defended that policy twice before in two "group" employment actions on

V. Finally, petitioners contend that the class notice worked a forfeiture because it stated that all class members who failed timely to opt out of the settlement would be bound by the final judgment. Pet. 24-30. Both of the lower courts rejected this argument out of hand because the very element of notice that petitioners assert is unconstitutional is in fact required both by Rule 23(c)(2) and due process.

The constitutionally required elements of notice are: (a) the court will exclude any class member who opts out timely; (b) the judgment will bind all class members who do not opt out; and (c) class members who do not opt out can appear through counsel. Fed. R. Civ. P. 23(c)(2); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Petitioners do not dispute that the class notice contained all of those elements. *See* Pet. App. 63a (class members notified that the court would exclude any member who opted out timely); Pet. App. 64a (class members were notified that the judgment would bind all class members who did not opt out timely, or who

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different grounds from those brought by the *Tice* plaintiffs, and from which the *Tice* plaintiffs had been specifically excluded. The Seventh Circuit held that the previous lawsuits, to which the *Tice* plaintiffs were not parties, did not bar their suit.

Tice is completely irrelevant to, and does not contradict, the decision below. Here, not only did the district court certify a class of which each petitioner is a member, but each of petitioners' claims against the fractionators is expressly barred by the factor concentrate judgment.

Petitioners' further reliance upon *Epstein* v. *MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997), *opinion withdrawn and superseded by Epstein* v. *MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999), is also misplaced. They cite to a 1997 panel opinion that was later withdrawn. The Ninth Circuit ultimately held that class members do not have a broad right to challenge collaterally the adequacy of representation if the certifying court makes a determination of the adequacy of representation in accordance with this Court's precedent. 179 F.3d at 648 (discussing *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985)). That holding is entirely consistent with the decisions by the lower courts in this case.

neither opted in nor out); Pet App. App. 64a (class members could appear through counsel).

It has long been recognized that the due process requirements of Rule 23(c)(2) are constitutionally required, and that notice that complies with Rule 23(c)(2) – as the lower courts held this one did – is constitutionally sufficient. *See Phillips Petroleum Co.*, 472 U.S. at 812; *Carlisle & Jacquelin*, 417 U.S. at 173; *Mullane* v. *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). Petitioners' collateral attempts to rewrite the law of notice should be rejected.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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